

1 UNITED STATES BANKRUPTCY COURT

2 DISTRICT OF NEVADA

3 LAS VEGAS, NEVADA

4 In re: USA COMMERCIAL MORTGAGE) E-Filed: 10/21/10
5 COMPANY,)
6 Debtor.) Case No.
7) BK-S-06-10725-LBR
8) Chapter 11
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12 TRANSCRIPT OF PROCEEDINGS
13 OF

14 HEARING RE: MOTIONS

15 VOLUME 1

16 BEFORE THE HONORABLE LINDA B. RIEGLE
17 UNITED STATES BANKRUPTCY JUDGE

18 Friday, May 11, 2007

19 9:30 a.m.

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23 Court Recorder: Helen C. Smith and Larry Espinoza

24 Proceedings recorded by electronic sound recording;
25 transcript produced by transcription service.

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1 (Court convened at 09:37:01 a.m.)

2 THE COURT: Okay. I'd like to do USA Investors VI
3 first, so that those people who are involved in that can go,
4 and we'll do the others matters later.

5 So USA Investors VI starting with the matter on item
6 No. 3.

7 Appearances, please.

8 (Colloquy not on the record.)

9 MR. GARMAN: Your Honor, Greg Garman with
10 Gordon & Silver, counsel -- post-counsel to USA Investors VI.

11 MR. SHAPIRO: Good morning, your Honor.
12 Brian Shapiro on behalf of Vesta Hospitality.

13 MR. LANDIS: Good morning, Judge. Augie Landis,
14 Assistant United States Trustee.

15 THE CLERK: We have parties on the phone,
16 Judge.

17 THE COURT: Okay. And on the telephone, anyone wish
18 to make an appearance to USA Investors VI?

19 MR. CHARLES: Thank you, your Honor. Rob Charles
20 from Lewis and Roca on behalf of the USACM Liquidating Trust
21 and servicer for the senior lien, and thank you for letting me
22 appear telephonically.

23 THE COURT: Okay.

24 MR. GARMAN: Your Honor, there are a few matters
25 before you that were trailed from the last hearing as well as

1 our motion to consolidate.

2 Let me give you a brief update in the USA Investors VI,
3 and I'm going to give you a brief update also in Tree Moss
4 because they're fairly related.

5 As you will hear --

6 THE COURT: Yeah. I don't see Tree Moss on the
7 calendar, but it's supposed to be on calendar, right, or am I
8 just missing it?

9 MR. GARMAN: No. There's actually nothing that has
10 been ordered to be on calendar for today --

11 THE COURT: Oh, okay.

12 MR. GARMAN: -- but both of these entities are
13 100-percent owned by USA Investment Partners or the IP case.
14 In both instances, IP is the member and manager.

15 They are two facilities in Palm Springs, California, the
16 Hotel Zoso being the primary asset in the Investors VI case
17 and next door the Marquis Villas being a condo facility that
18 has somewhere between 100 and 110 units.

19 The condo facility has only two owners of the units
20 inside, Tree Moss being the 60-some-odd unit owner, and
21 Sunterra, the big nationwide timeshare entity holding 30-some
22 of the units.

23 They are somewhat affiliated in that there is a minor bit
24 of infrastructure that the two facilities share. But for all
25 practical purposes, they run independently of one another.

1 It's the trustee's intent to commence a sale proceeding for
2 both facilities.

3 And just to give the Court a heads-up as to where the
4 trustee is at the moment, we spent about a day down there going
5 through trying to get, among other things, statements and
6 schedules going but meeting with probably ten or more potential
7 buyers and one or more of the facilities.

8 Some potential buyers have shown an interest in having a
9 consolidated-sale proceeding in which they believe there might
10 be synergy to acquiring both assets as opposed to simply one,
11 obviously some buyers saying they just wanted the hotel or the
12 condos. We're evaluating that, and we'll be back.

13 I'm sure by the time you take the bench again we will be
14 in a position to have teed up a sale process with the
15 stalking horse probably on both sides in timelines that you'll
16 hear.

17 Unfortunately, those two facilities are in fundamentally
18 different economic shape. The hotel -- which is a beautiful
19 facility, by the way -- has a management company which is
20 Vesta, Mr. Shapiro's client, seems to be running on all
21 cylinders.

22 It seems to have sufficient cash reserves, and operations
23 seems to be tip-top at the moment. Essentially, we have no
24 short-term concerns about the economic viability of that
25 debtor.

1 Tree Moss, on the other hand, is in an unfortunately
2 different set of circumstances. And once we were able to get
3 our hands just Tuesday and Wednesday on the books and records
4 of what Tree Moss looked like, it's become apparent that next
5 week is going to be somewhat of a make-or-break week for us and
6 that it's going to run out of cash.

7 There is an interesting -- we don't need to go into it
8 this morning, but just so you're aware, there's a very
9 interesting dynamic between the way operations are funded
10 between our 60 units and Sunterra's 30 units which involves a
11 homeowners association to represent the two of us. The
12 homeowners association has to pay all the bills, but there are
13 assessments made against the debtor and against Sunterra.

14 The debtor doesn't have the funds to pay its allocation of
15 what we anticipate the assessment will be based upon the next
16 homeowners association meeting, so we've had some preliminary
17 discussions with the Diversified Fund who has the primary
18 economic interest in the Tree Moss case.

19 And we've tentatively agreed that upon certain events
20 taking place, they will fund an emergency DIP in order to allow
21 us to work through the sale process.

22 We've prepared budgets for 13 weeks and 26 weeks for a
23 variety of reasons, but we will be coming back before the Court
24 with a DIP, and the reason I'm bringing this up now is I know
25 you're leaving for a couple of weeks.

1 We began those discussions late Wednesday. We made a lot
2 of progress on them yesterday, and I think we are fundamentally
3 in agreement. The wild card for us is what Sunterra's going to
4 do, and we should know that early today.

5 But while you're gone, I anticipate that we will need to
6 have one of the other judges deal with an emergency DIP on an
7 interim basis for only that amount of money that will be
8 necessary until you get back for our next omnibus date on the
9 31st.

10 THE COURT: Well, I could be available
11 telephonically --

12 MR. GARMAN: Okay.

13 THE COURT: -- the 16th, 17th, or 18th.

14 MR. GARMAN: Okay.

15 THE COURT: Will --

16 MR. GARMAN: And I anticipate --

17 THE COURT: Sorry. 17th or 18th.

18 MR. GARMAN: 17th or 18th?

19 So I anticipate that come --

20 THE COURT: Maybe the 21st, but 17th or 18th I'm
21 judging the ABI litigation seminar, so I can get to a phone or
22 get to --

23 MR. GARMAN: There's no reason that by -- come Monday
24 we wouldn't have something on file --

25 THE COURT: Okay.

1 MR. GARMAN: -- because we'll know where we're at, so
2 I think that those two dates will work, and I'll work with your
3 courtroom deputy to make sure that it all gets put together.

4 So that's why we sort of deal with the breakup of the
5 cases Tree Moss and Investors VI as a single unit, despite the
6 fact they're two --

7 THE COURT: Right.

8 MR. GARMAN: -- independent cases, and we're not
9 planning at the moment on subsequently consolidating them.

10 THE COURT: Now, I've forgotten. Does Diversified
11 actually hold a deed of trust on Tree Moss and/or Zoso or is
12 this one they're relying on the constructive theory?

13 MR. GARMAN: Zoso has a loan on which Mr. Charles and
14 his client, the Trust, are the servicer for a loan of -- I
15 don't remember what the amount is.

16 So on Investors VI we do have a loan, a secured loan, in
17 which the USA Commercial Mortgage Liquidating Trust is a loan
18 servicer as you recall pursuant to the plan.

19 THE COURT: Right. But who's the beneficiary?

20 MR. GARMAN: The makers of the notes are a series of
21 direct lenders, and I do not recall --

22 THE COURT: You mean beneficiaries of the note.

23 MR. GARMAN: I'm sorry. Yeah. Direct lenders are on
24 that loan. I do not recall whether or not at the moment
25 Diversified was a direct lender in that loan.

1 On the Tree Moss side, among other things, you recall that
2 when the note in favor of Investment Partners was made last
3 year, there were a series of equity interests that were pledged
4 as collateral to secure those note obligations.

5 Tree Moss falls in that category of equity interest of IP
6 whose benefit flows to one or more of the trusts or
7 Diversified. As I stand here right now, I don't recall exactly
8 where it worked out.

9 But, among things, we're globally working towards a
10 resolution with the trust and --

11 THE COURT: Well, I appreciate that, but --

12 MR. GARMAN: -- with Diversified --

13 THE COURT: But don't forget -- and this is aimed
14 more at the Diversified counsel. You know, if you're going to
15 make DIP financing, you're going to have to show to me that
16 there's going to be some economic interest down at the end or I
17 guess, arguably, you can make DIP financing and get -- if
18 you're going to get repaid like any other lender, that's fine,
19 too, but --

20 MR. GARMAN: Oh, rest assured. We're covering all
21 those bases. It'll be in there.

22 THE COURT: Because the point is, you know, there may
23 not be any equity interest as opposed to if there really was
24 some -- the real --

25 MR. GARMAN: Right.

1 THE COURT: -- deeds of trust, some constructive
2 deeds of trust, et cetera.

3 MR. GARMAN: What we're contemplating right now and
4 what's generally been agreed to in principle is that they would
5 simply make a more traditional DIP loan, and that they will be
6 the first dollars out upon the sale.

7 THE COURT: Okay.

8 MR. GARMAN: But, again, we will put that together
9 hopefully today and over the weekend to be in some fashion so
10 that all the information is before you. But just given the
11 fact that you were leaving town, I wanted to make you aware of
12 where we were headed.

13 THE COURT: Okay.

14 MR. GARMAN: So, your Honor, the first motion you
15 have before you today is our motion to consolidate the
16 involuntary case in the Investors VI with that being the
17 voluntary that we subsequently filed.

18 If you will recall, the involuntary was filed in December,
19 and it was filed as an involuntary 7. We came to court, and
20 the trustee was prepared in her capacity as member manager to
21 consent to the involuntary, but for a variety of reasons we
22 collectively decided that it was safer to avoid litigation and
23 some other issues if we filed a voluntary 11.

24 The impact of those two collateral cases is the avoidance
25 actions and the look-back period, and so what I proposed to you

1 at that hearing is what this motion requests which is that
2 customary in situations like this where an involuntary is filed
3 and subsequently converted to a voluntary case, we use the
4 involuntary case petition date for the purposes of a look-back
5 period and the order for relief date of the voluntary case and
6 consolidate the two.

7 So the request that we have is that you consolidate the
8 involuntary case with the voluntary case pursuant to Rule 1015
9 which specifically addresses this issue.

10 We file a copy of the order consolidating both in the
11 involuntary case and the voluntary case using the voluntary
12 case's docket for all purposes on a going-forward basis, the
13 involuntary case be held in abeyance while we proceed down the
14 voluntary case timeline.

15 We provide that the petition date of December 15th be the
16 petition date for the purposes of the consolidated cases. We
17 use the consolidated case number of 12377 which is the
18 subsequent voluntary case.

19 We provide that all future filings be with respect to the
20 -- in the voluntary case, and that we use the caption for the
21 voluntary case.

22 The reason that this is all essential, in addition to
23 using the petition date of the involuntary for purposes of
24 look-back, is that we have substantial issues as to gap
25 creditors.

1 We were in the gap period for, what, 100 days or more
2 while our vendors at the hotel continued to operate on a
3 going-forward basis.

4 Many of those vendors were paid in the ordinary course,
5 but we have found that the timing of our filing of our
6 voluntary was specifically very unfortunate in that on April
7 30th, the last day -- business day of the month, the hotel ran
8 a payables, and we issued checks to all of our vendors for the
9 hotel.

10 It is my belief that those are creditors that the hotel
11 and the debtor are authorized to pay. But to the extent it
12 ultimately becomes necessary, we may be coming back before you
13 with a motion to pay those priority claims.

14 But I think that the code provides that gap creditors are
15 specifically designed to be protected in situations like this
16 to ensure that the hotel operations continue on a going-forward
17 basis during that gap period.

18 So that's the relief we've requested. We think that the
19 rules specifically provide for it, and that's where we're
20 headed in the Investors VI case.

21 THE COURT: Okay. So any objection? All right.
22 That motion is granted.

23 And just to be clear, the motion you were talking about
24 you anticipate would be in Tree Moss, not in Investors VI.

25 MR. GARMAN: That's correct.

1 THE COURT: Okay. Now, I also have the continuing
2 motion for permitting to honor hotel room deposits. I only had
3 a concern at that time that I just wanted you to make double
4 sure that those were all legitimate, et cetera --

5 MR. GARMAN: Yes, your Honor.

6 THE COURT: -- and you've reviewed all that?

7 MR. GARMAN: I have been to the hotel, and I have --
8 I've personally talked to management and their staff,
9 Mr. Shapiro's clients and the like.

10 The way this hotel operates is that we do have a
11 management company in place, Vesta. The employees are not
12 employees of Vesta.

13 They're, in fact, the debtor's employees, and they simply
14 act as our agent, so the bank accounts are ours, and all
15 functions of the hotel are ours. They are a reputable
16 management company who manages hotels across the country.

17 I have no concerns, and we've uncovered no evidence to
18 lead me to believe that any of the wage payments by way of the
19 next motion would go to insiders, and I have no reason to
20 believe that any of these room deposits or commissions that
21 would be paid to travel agents are in any way improper, and
22 these are just typical arm's-length transactions.

23 THE COURT: All right.

24 MR. GARMAN: So --

25 THE COURT: So any opposition there? All right. So

1 that's granted. All right.

2 Next, we have the continued motion to pay wages, salaries,
3 employee benefits. I'd allowed the payment of wages and
4 salaries. I wanted to hold off on the other benefits 'til you
5 had an opportunity to make sure there was nothing out of the
6 ordinary in that regard.

7 MR. GARMAN: Your Honor, same representations as last
8 time. We have 160, give or take, full-time employees that had
9 accrued \$137,000 in wages.

10 THE COURT: And these are hotel employees.

11 MR. GARMAN: These are hotel employees, but, again,
12 under the direction of Vesta in their capacity as management.
13 We've uncovered nothing, and we've looked, to lead us to
14 believe that any of these payments are going to insiders,
15 nothing improper about them.

16 We looked at the vacation accrual and the expense
17 reimbursements. And the expense reimbursements, by the way, we
18 believe altogether are \$1,000.

19 And, again, these are hard-working folks at the hotel who
20 we believe should be paid and should be protected. They are a
21 valuable asset to us on a going-forward basis.

22 THE COURT: Okay. Any objection? All right.

23 So that's granted.

24 MR. GARMAN: And then, finally, your Honor, there is
25 a motion to extend the time to file statements and schedules.

1 You indicated at your last hearing that you would grant
2 that motion on an ex parte basis provided that the U.S. Trustee
3 approved. They do approve; however, the order stated that all
4 of these motions would be continued --

5 THE COURT: That's fine.

6 MR. GARMAN: -- until today, so --

7 THE COURT: Okay. So that's granted.

8 MR. GARMAN: -- because that's on file. Yes.

9 There was one Tree Moss matter that you may have been
10 referring to earlier that we did seek an OST on that an order
11 has not been entered. I think we can deal with that on the
12 31st.

13 THE COURT: Okay.

14 MR. GARMAN: But it is a motion to extend a potential
15 deadline to file the statements and schedules in Tree Moss to
16 the extent it's necessary when you convert from a 7 to an 11.

17 THE COURT: Okay.

18 MR. GARMAN: There's case law that says when you go
19 the other direction, you've got to file new statements and
20 schedules. Ms. Gray (phonetic) in my office is the one who
21 errs on the side of caution which is always useful, so it's
22 nothing more than a protective request to make sure that we
23 don't get in trouble to the extent that --

24 THE COURT: It seems to me that's something the U.S.
25 Trustee could stipulate to. And --

1 MR. GARMAN: Um-h'm.

2 THE COURT: -- of course, if they don't want to
3 stipulate, I would be glad to have argument. But if they do
4 stipulate, that could take that matter off calendar.

5 MR. LANDIS: Your Honor, that makes perfect sense.
6 We would stipulate to that sort of an order at this time.

7 THE COURT: Okay. All right.

8 MR. GARMAN: So --

9 THE COURT: So we won't need that, then.

10 MR. GARMAN: Thank you, your Honor.

11 THE COURT: Okay. Thank you. Okay.

12 Next, let's do -- and even this is a USA -- well, these
13 are two USA Commercial versus HMA. Let me deal with these
14 next. All right.

15 In the USA versus HMA -- oh.

16 Mr. Gordon?

17 MR. GORDON: Yes, your Honor.

18 May I suggest that given the Court is not aware we did
19 file HMA into chapter yesterday evening. That really those
20 matters are going to be more important now in the HMA matter.

21 It makes sense to deal with both of those together, and I
22 would suggest that you hear the DACA, the true USACM matter,
23 the Compass/DACA matter. That may make more sense, and then
24 we'll deal with both of those -- well, the first matter and the
25 last matter --

1 THE COURT: Okay.

2 MR. GORDON: -- together.

3 THE COURT: (Indiscernible) matters who could go
4 first. All right.

5 The next, then, we'll go ahead and do the matter No. 2,
6 motion to enforce confirmation order.

7 And appearances in the USA Commercial Mortgage.

8 (Colloquy not on the record.)

9 MR. DAVIS: Good morning, your Honor. George Davis
10 of Cadwalader, Wickersham & Taft on behalf of Compass Partners.

11 (Colloquy not on the record.)

12 MR. KIRBY: Good morning, your Honor. Dean Kirby,
13 Kirby & McGuinn for Vindrauga Corporation.

14 MR. LANDIS: Good morning, again, Judge.
15 Augie Landis, Assistant United States Trustee.

16 THE COURT: Okay. Let me ask Mr. Kirby first.

17 In light of Mr. Blatt's last supplemental affidavit which
18 purports to suggest that you don't have 51 percent anymore,
19 what's your response to that? Because that to me is the whole
20 key. I don't go any farther if there's not 51 percent.

21 MR. KIRBY: Well, your Honor, I think that what
22 they've done here or what they say they're going to do, more
23 accurately, is a violation of the plan, and I do want the
24 opportunity to explain that.

25 THE COURT: Well, I just want to know whether or not

1 you've got 51 percent or not. You may have some other motion
2 you're going to bring before me, but this motion is a motion to
3 enforce rights. If you don't have 51 percent, you could see
4 that that ends the issue --

5 MR. KIRBY: Well, your Honor --

6 THE COURT: -- as to this particular group.

7 MR. KIRBY: We made the showing in our opposition
8 that we have 75 percent, roughly. Right? Now, 75 percent have
9 designated our client as the loan servicer.

10 The question is do they have 51 percent now. That's the
11 question.

12 THE COURT: You still claim you have 51 percent, at
13 least.

14 MR. KIRBY: Well --

15 THE COURT: Do I have to have an evidentiary hearing
16 on this?

17 MR. KIRBY: You don't have to have an evidentiary
18 hearing, but there is an important, very important issue of
19 interpretation of the plan, the Section 3 right --

20 THE COURT: No.

21 MR. KIRBY: -- on --

22 THE COURT: I only --

23 MR. KIRBY: -- the 51 --

24 THE COURT: -- have that issue if I have a case in
25 controversy.

1 MR. KIRBY: I understand that.

2 THE COURT: Do I have a case in controversy?

3 MR. KIRBY: Absolutely, you do.

4 THE COURT: So you have 51 percent.

5 MR. KIRBY: Well, okay. I'll answer that question
6 yes.

7 THE COURT: Okay.

8 MR. KIRBY: I want to be heard on this specific issue
9 of the 51 percent, and it is not a simple yes-or-no question.

10 THE COURT: All right.

11 MR. KIRBY: It is an important question --

12 THE COURT: Okay.

13 MR. KIRBY: -- of interpretation of the plan.

14 Would your Honor wish me to proceed or Mr. Davis to
15 proceed first?

16 THE COURT: I'll let Mr. Davis go ahead first. I
17 just wanted to see what your position was as to what percentage
18 you held.

19 MR. KIRBY: Thank you, your Honor.

20 MR. DAVIS: Good morning, your Honor.

21 I think the simple answer to your Honor's question is they
22 don't have 50 percent, but we'll let that play out.

23 We're here today on Compass' motion for an order enforcing
24 the confirmation order and determining that no surviving
25 Section 3 right exists with respect to the Fiesta Oak Valley

1 loan.

2 Your Honor, on February 18th of this year, Compass paid
3 these estates approximately \$16,000,000 pursuant to the
4 debtor's confirmed Chapter 11 plan in order to purchase the
5 servicing rights and accrued servicing fees and loan
6 participation interests owned by the debtors.

7 As your Honor will recall, DACA was one of the parties
8 objecting to the sale and confirmation of the plan, although it
9 had never participated in the auction process established by
10 the debtors and approved by the Court.

11 DACA is a self-described distressed investor that, quote,
12 "purchases" -- this is its own description of itself -- "claims
13 at a discount in anticipation of receiving a favorable return
14 from the debtor upon its emergence from bankruptcy." That's
15 important for the reasons that I will get to, your Honor.

16 Your Honor, six months --

17 THE COURT: Well, there's been a lot going back and
18 forth. Neither of you are exactly (indiscernible)
19 institutions, so --

20 MR. DAVIS: But, your Honor, one of us paid these
21 estates \$60,000,000.

22 THE COURT: I know, but there's a contract clause
23 here, so I just want to know how you fit within this contract
24 clause and whether or not --

25 MR. DAVIS: Well, it's very --

1 THE COURT: -- under the contract.

2 MR. DAVIS: Okay. If your Honor -- I think it's
3 important for your Honor to have some backdrop as to what has
4 been going on here because --

5 THE COURT: I mean, I'll take as a given --

6 MR. DAVIS: -- we're going to --

7 THE COURT: -- they're evil incarnate --

8 MR. DAVIS: No, but --

9 THE COURT: -- but the point is that's not relevant.

10 MR. DAVIS: I understand, but I think -- and I'm
11 happy to skip forward and go exactly to the substance if that
12 would --

13 THE COURT: Okay.

14 MR. DAVIS: -- please your Honor --

15 THE COURT: Please.

16 MR. DAVIS: -- but I think there is some important
17 background. Okay.

18 Your Honor, in terms of -- to exercise -- well, basically,
19 when Compass purchased the servicing rights, it purchased those
20 servicing rights and agreements and, you know, free and clear
21 of all liens, claims, and encumbrances, including monetary and
22 nonmonetary defaults other than what has been described as a
23 surviving Section 3 right.

24 Under Section 3 of the loan-servicing agreement, it
25 requires two things. One, it requires that there be a borrower

1 default. Two, it requires that there be a servicer default.

2 And your Honor's order and the way that it was structured
3 poses yet another requirement. That those defaults shall have
4 existed and been matured and fully exercisable at the time of
5 the USACM Chapter 11 petition date.

6 I think, your Honor, you don't need to deal today I don't
7 believe with whether there was a borrower default, whether
8 there was a servicer default as of the USACM petition date,
9 whether those defaults were matured and exercisable, whether
10 Compass had cured those defaults post closing.

11 I don't think your Honor has to deal with any of that
12 today for one simple reason, and that is that Compass exercised
13 its rights under Section 6 -- under Section 2(c)(3) of the
14 loan-servicing agreements to purchase approximately 48 percent
15 of the total outstanding loan participations leaving DACA with
16 under 30 percent of the loan participations.

17 THE COURT: Well, my math isn't very good. But if
18 you purchase 48 percent, why couldn't they have 52 percent?

19 MR. DAVIS: It's --

20 THE COURT: I mean, if they got everybody.

21 MR. DAVIS: It's 48 percent of the 75 -- 48 percent
22 are 100 percent -- well, 100 percent of the 48 percent make up
23 the 75 percent that support them, so that brings them from 78
24 percent -- or 75 percent less 48 percent. You wind up with
25 less than 30 percent.

1 I agree that --

2 THE COURT: Oh, I see what you're saying.

3 MR. DAVIS: Okay.

4 THE COURT: Okay.

5 MR. DAVIS: That's how it gets down to that.

6 THE COURT: So you say they don't have the 51
7 percent.

8 MR. DAVIS: Absolutely not.

9 THE COURT: Okay.

10 MR. DAVIS: Absolutely not.

11 Your Honor, in Section 6 point -- I'm sorry, Section
12 2(c)(3). Compass' rights under Section 2(c)(3) were expressly
13 preserved in paragraph 14 of your Honor's confirmation order
14 which provides, "The post-closing survival of a surviving
15 Section 3 right shall not impair in any respect any rights or
16 interests of Compass under the loan-servicing agreements,
17 including, without limitation, its rights under Section 2(c)(3)
18 of the loan-servicing agreement, i.e., the right to buy out the
19 interest."

20 You know, as your Honor mentioned in the supplemental
21 declaration of David Blatt which was filed on May 7th, on
22 April 24th, 2007, Compass wired approximately 12.4 million
23 dollars to Orange Coast Title Company representing the total
24 outstanding principle and accrued interest through April 30,
25 2007, on account of the 47.36 percent of the beneficial

1 interest in the Fiesta Oak Valley loan together with certain
2 assignment processing fees.

3 THE COURT: So how did that work?

4 MR. DAVIS: The --

5 THE COURT: An individual had to put a call on that?
6 In other words, it wasn't paid out pro rata? It was just
7 whoever put their request in got paid?

8 MR. DAVIS: Well, under --

9 THE COURT: I'm not sure it makes a difference. I'm
10 just curious --

11 MR. DAVIS: Under the --

12 THE COURT: -- and want to understand this.

13 MR. DAVIS: -- loan-servicing agreement, you know,
14 Compass has the absolute right to purchase the interest, and
15 the direct lenders have the obligation to transfer them.

16 So rather than just send people checks and hope that
17 they'll sign an assignment agreement, Compass put the money
18 into an escrow account.

19 The escrow agent then -- and sent letters to all of the
20 parties whose right -- whose participation interest it was
21 purchasing. Now, remember, it was purchasing them at the full
22 amount of the principle outstanding.

23 THE COURT: Was this offer made to everybody?

24 MR. DAVIS: I'm not sure. I'm not sure, your Honor.
25 I don't think so. I think it was made to the substantial

1 majority of them.

2 This is a loan, your Honor, that -- I don't know how much
3 background you have on it, but this is a loan where the amount
4 of the loan originally made was about \$20,000,000. Now with
5 accrued interest and related charges it's probably about
6 \$30,000,000.

7 The value of the property -- the borrower received a
8 letter of intent from a major real estate purchaser, a
9 developer in California, to purchase the property a year ago
10 for \$215,000,000. There's no doubt that these people are going
11 to get paid and get paid in full.

12 THE COURT: And what does -- and, again --

13 MR. DAVIS: Compass has been --

14 THE COURT: -- this is not relevant, but --

15 MR. DAVIS: It's not relevant --

16 THE COURT: -- status wise --

17 MR. DAVIS: Compass has been --

18 THE COURT: -- what's happening with the loan?

19 MR. DAVIS: -- actively involved in negotiating with
20 the borrower. Part of the issue, the borrower is owned in part
21 by USAIP which is now I believe a Chapter 11 debtor before your
22 Honor which had previously commenced a receivership proceeding
23 in California.

24 There was concern over the breadth of the injunction that
25 was entered in that receivership proceeding, and Compass had

1 hired California counsel and was advised that it couldn't and
2 shouldn't begin foreclosure proceedings because it would --
3 could run afoul of that injunction order.

4 It was then talking to the committees here and the trust
5 who are going to seek to file an involuntary Chapter 11 case
6 against USAIP. And they were advised that if that were to
7 occur and the involuntary became a voluntary, the California
8 receivership proceeding would be dismissed.

9 And, therefore, it's quite clear that if USAIP is a
10 Chapter 11 debtor, its interests in the borrower are property
11 of its estate, but the assets of the borrower are not property
12 of its estate. It was unclear in the California proceeding
13 just because of the breadth of the order.

14 So it has been actively negotiating with the borrower and
15 for a full payment plan to the direct lenders. It has been
16 discussing with various developers the possibility of either
17 purchasing from the borrower directly or purchasing from the
18 direct lenders directly their claims, again, either purchasing
19 the property from the borrower or purchasing from the direct
20 lenders their claims for full principle plus interest.

21 Either way, no matter what happens, they haven't -- and
22 just recently they have hired counsel just to, you know, ensure
23 that all angles and all possibilities are covered, even though
24 they think that this ultimately will prove to be unnecessary.
25 They have retained counsel to commence a foreclosure

1 proceeding.

2 THE COURT: And let me make it clear, I recognize
3 that these questions I've asked you and your responses are not
4 relevant to this particular discussion. I just neglected to
5 sort of ask for a status report, and I really don't have the
6 right to --

7 MR. DAVIS: No. That's okay.

8 THE COURT: -- afterwards.

9 So just to make it clear, I recognize that these questions
10 -- it's not relevant what they're doing now. What's relevant
11 is what were the surviving rights and who has the right --

12 MR. DAVIS: Sure.

13 THE COURT: -- to exercise those.

14 MR. DAVIS: Your Honor, paragraph 14 of the
15 confirmation order expressly grants Compass the right to
16 challenge the attempted exercise of a surviving Section 3 right
17 by filing a motion with your Honor, and provides that, "This
18 Court retains jurisdiction to adjudicate any such dispute, and
19 most importantly for this purpose also provides that the
20 effectiveness of the attempted exercise of such surviving
21 Section 3 right shall be stayed pending this Court's
22 adjudication of the Compass motion."

23 So all of these things were put in motion, the action to
24 purchase, the demand for parties to sign the assignment and
25 receive 100 percent of what they were legally entitled to. All

1 principle plus accrued and unpaid interest was made during this
2 period, and the money was funded into escrow.

3 It was done in this manner so as to ensure -- rather than
4 just mailing people their checks to their home and then hoping
5 that they will send back the assignment, it was done in this
6 manner.

7 I have an affidavit. This was not supposed to be an
8 evidentiary hearing, but I have an affidavit from someone at
9 Orange Coast Title which I, you know, could provide to
10 your Honor today which would describe that.

11 Again, Compass had tendered for 40-some-odd percent. At
12 this date, already Orange Coast Title has received the signed
13 assignment forms back from 30 percent in the aggregate of the
14 total amount of the loan.

15 So the 45 percent was the amount tendered for 47 percent.
16 30 percent already of the total -- not 30 percent of the 47
17 percent, 30 percent of the total leaving only 17 percent have
18 as of today already tendered the assignments.

19 THE COURT: So --

20 MR. DAVIS: At --

21 THE COURT: -- by that math they can't hold 51
22 percent?

23 MR. DAVIS: By my math they can't because they were
24 only at 75, and already 30 have already tendered.

25 THE COURT: Okay.

1 MR. DAVIS: So that leaves them today -- even though
2 I don't think it's relevant because I think the exercise would
3 have been effective when the demand was made and the money was
4 sent into escrow, even today they're under 50 percent.

5 THE COURT: Okay.

6 MR. DAVIS: So if your Honor has any questions, I'm
7 happy to answer them. But, you know, I think it's important --
8 I'll just say this.

9 And I know this is not what's before your Honor today, but
10 this action to try to replace Compass was something that was in
11 the works literally for six months before the closing date.

12 DACA began purchasing at a discount direct-lender
13 interests even before the closing in early January of this
14 year. They started soliciting these designations to replace
15 Compass.

16 They sent the replacement on behalf of 51 percent of the
17 owners 12 days after we closed. Their pleadings are replete
18 with references to, well, if Compass would only get off of --
19 you know, would only get moving and actually do something, the
20 lenders wouldn't want to replace them.

21 Well, the fact is, your Honor, 12 days after the closing
22 we were sent a letter that is the subject of the motion today.

23 THE COURT: Okay. All right.

24 Mr. Kirby?

25 MR. KIRBY: Your Honor, the Court's made it very

1 clear, and I understand that what is on the Court's mind are
2 not the various issues about Nevada law and when this right is
3 exercisable.

4 What's on the Court's mind is this issue of the 51
5 percent, and I want to go right to that, and I want to talk
6 only about that. And if I accidentally don't talk about it,
7 let me know.

8 Compass is trying here to take a shortcut that avoids the
9 proper operation of this Section 3 right.

10 And understand, please, your Honor, Mr. Blatt's
11 declaration, the one that the Court referred to when I was up
12 here the first time, does not say that anyone has changed their
13 vote, and it doesn't say that Compass has purchased enough of
14 the interests in this loan to give them 51 percent.

15 Now, you know, if Compass gets 51 percent, they can
16 vote --

17 THE COURT: Well --

18 MR. KIRBY: -- 51 percent.

19 THE COURT: -- conversely, you have to have 51
20 percent to terminate.

21 MR. KIRBY: We did. We did.

22 THE COURT: You --

23 MR. KIRBY: We -- we (indiscernible) --

24 THE COURT: Do you now have 51 --

25 MR. KIRBY: Well --

1 THE COURT: -- percent --

2 MR. KIRBY: And --

3 THE COURT: -- to terminate?

4 MR. KIRBY: And, your Honor, that's the crux of the
5 issue, and, please, it's not as straightforward as that, and
6 there are important reasons to think about how this is being
7 done.

8 Now, your Honor --

9 THE COURT: Well, look. You bought all this debt at
10 a discount, so don't give me this crying on the shoulder.
11 Right? How much --

12 MR. KIRBY: I'm not --

13 THE COURT: -- did you pay for people's debt? You
14 didn't pay them 100 percent, did you?

15 MR. KIRBY: In many cases, yes.

16 THE COURT: How many cases --

17 MR. KIRBY: 51 percent --

18 THE COURT: -- did you not pay 100 percent?

19 MR. KIRBY: Many.

20 THE COURT: Right. You didn't pay people 100
21 percent.

22 MR. KIRBY: Well, your Honor, if I was crying, I've
23 already dried my tears. All right?

24 THE COURT: Okay. But you --

25 MR. KIRBY: I'm not --

1 THE COURT: -- didn't pay --

2 MR. KIRBY: I'm not crying --

3 THE COURT: You didn't pay --

4 MR. KIRBY: -- and I'm not --

5 THE COURT: -- the individuals 100 percent for the
6 assignment of their interest. Right?

7 MR. KIRBY: I think we did in some cases, but
8 certainly --

9 THE COURT: But not all the cases.

10 MR. KIRBY: -- not in all.

11 THE COURT: Right?

12 MR. KIRBY: Yes. Uh-huh.

13 THE COURT: And you bought them knowing they were in
14 default. Right?

15 MR. KIRBY: Right.

16 THE COURT: Right. And you didn't pay the estate
17 anything for this right to do that, right?

18 MR. KIRBY: The right to buy loan interests at --

19 THE COURT: Right.

20 MR. KIRBY: -- a discount? No.

21 THE COURT: Okay.

22 MR. KIRBY: All right. Your Honor, look what went
23 down here exactly.

24 Vindrauga, my client, gets 51 percent and ultimately 75
25 percent of these direct lenders to designate them as the loan

1 servicer. Right?

2 The plan says that Compass has 30 days from the date that
3 they receive that notification to file a motion in this court
4 showing that that action was invalid for whatever reason.

5 They go 30 days, the full 30 days, and they use -- and
6 they file, as your Honor knows, this three-and-a-half page
7 motion that really doesn't challenge anything. It doesn't
8 contest that we have 51 percent. It doesn't really say that
9 USACM didn't violate the loan-service agreement.

10 What they do during the 30 days is they send out a letter
11 to all of these investors offering on behalf of a third party,
12 on behalf of a third, to buy their interests at 91 percent of
13 principle.

14 THE COURT: Well, isn't that how you got your
15 interest? You send out a letter --

16 MR. KIRBY: Well --

17 THE COURT: -- about saying let me buy your interest?

18 MR. KIRBY: I do understand, your Honor. This isn't
19 a question --

20 THE COURT: That's how you did it, too. Right?

21 MR. KIRBY: I'm not trying to heap blame --

22 THE COURT: Okay.

23 MR. KIRBY: -- on them --

24 THE COURT: But --

25 MR. KIRBY: -- or praise on us. I'm trying to

1 explain --

2 THE COURT: But there's nothing unusual about that
3 because you do it every day in your business. Right?

4 MR. KIRBY: I didn't claim that there was anything
5 unusual about it. I mean, please let me -- please let me --

6 THE COURT: Okay.

7 MR. KIRBY: -- get my point across if I could. They
8 send out this letter offering to buy these interests.

9 Now, what they want to accomplish here, and what Mr. Davis
10 is arguing, and what Mr. Blatt's declaration is all about, they
11 say, well, if we buy two percent of these interests at a
12 discount and take you from 51 to 49, then the action of 51
13 percent of the lenders --

14 THE COURT: Well, now, did --

15 MR. KIRBY: -- in designating a new loan-servicing
16 agent was invalid. Right?

17 THE COURT: Didn't they get --

18 MR. KIRBY: That's what --

19 THE COURT: Why is it a discount? This is payment of
20 principle and interest?

21 MR. KIRBY: No. No, no, no. The letter from Compass
22 that went to these direct lenders during that first month which
23 is attached as an exhibit to Mr. Justice's (phonetic)
24 declaration offers on behalf of a third party to buy these
25 interests at 91 percent of principle only.

1 THE COURT: Okay.

2 MR. KIRBY: And that copy -- they don't deny it.

3 THE COURT: Um-h'm.

4 MR. KIRBY: And that's a copy of the letter that's
5 attached both to Mr. Justice's declaration and to Mr. Specker's
6 (phonetic) declaration.

7 Now think. I mean, let's ignore -- let's say there's no
8 bankruptcy at all, and 51 percent of a group of lenders who are
9 dissatisfied with their loan servicer designate a new servicing
10 agent.

11 Is it how Nevada law works that after that action is
12 taken, two percent can void it? I don't think so.

13 THE COURT: Well, what about the --

14 MR. KIRBY: And I think --

15 THE COURT: -- contract right that they have the
16 absolute right to pay and get the assignment of the rights?

17 MR. KIRBY: And we absolutely agree that if they
18 actually purchase 51 percent, then they can --

19 THE COURT: Why do they have to purchase 51 percent?

20 MR. KIRBY: Because Nevada law does not say that 51
21 percent can change loan servicers and 2 percent can change it
22 back.

23 And look at the way this went down, your Honor, is we get
24 51 percent. They go out and they try to purchase a few
25 interests at a very substantial discount. Vindrauga, at the

1 meantime, or DACA, its affiliate, goes and buys another 20, so
2 now we've thwarted that.

3 I mean, is that the way these motions are going to go in
4 this court? I mean, this --

5 THE COURT: Well, if the party whose true interest is
6 paid in full or at least they've taken that amount, then --

7 MR. KIRBY: Well, they haven't taken, yet, not yet.

8 I mean, Compass has said we've exercised our right.
9 Compass has put some money into an escrow.

10 30 percent of the total loan according to them have
11 actually closed, although that's not before your Honor, yet.
12 That's just the latest breaking news from Mr. Davis. That's
13 not 51 percent.

14 See, these motions -- and, your Honor, there are going to
15 be a bunch of them, and maybe in some of these motions in the
16 future we're not going to be able to ignore or avoid deciding
17 some of the other issues. Right?

18 But these motions should be simple. It should be, No. 1,
19 did Vindrauga or the proposed new loan servicing agent get 51
20 percent, and, second, did 51 percent of the direct lenders as
21 of the petition date have the right to change servicers.

22 THE COURT: Well --

23 MR. KIRBY: And if the answer to those two simple
24 questions is yes --

25 THE COURT: We don't get to the one question we don't

1 have 51 percent, right?

2 MR. KIRBY: We have 51 percent, and they don't.

3 THE COURT: You had --

4 MR. KIRBY: Now --

5 THE COURT: -- maybe. You don't --

6 MR. KIRBY: No one's changed --

7 THE COURT: -- have now.

8 MR. KIRBY: No one's changed their vote. No one's
9 changed their vote. All they're saying is that we're in the
10 process of buying these interests. And when we actually
11 succeed in buying 51 percent, then of course we can designate
12 our servicer.

13 But if your Honor doesn't rule this way -- well, think.
14 If your Honor rules as I'm suggesting, then 51 percent of these
15 direct lenders actually do have to get their money, principle
16 and interest.

17 If your Honor lets them play games with this up and down
18 tally as we go, oh, I have 51, now you only have 49, well, now
19 I have 70, well, we bought more, and now you're only down to --
20 if your Honor lets them do that, then what it means is that
21 only 2 percent of these people are going to get their money, or
22 10, or 20, or whatever the amount is to, quote, unquote, "bring
23 us down from 75 to 49 percent."

24 That's not what the plan had in mind here. I mean, and
25 that's certainly not what the Nevada statute is all about. 51

1 percent of these direct lenders have spoken.

2 Now, if they close their --

3 THE COURT: But once --

4 MR. KIRBY: -- escrows --

5 THE COURT: But under your theory, I guess all those
6 people will have to -- all that money will be refunded then to
7 those people. They can't keep that money anymore.

8 MR. KIRBY: No. They're going to go ahead and sell.
9 I mean, I would. Anybody would.

10 THE COURT: No. How can they? If they've changed
11 their servicer, part of the contract was under signing they get
12 their --

13 MR. KIRBY: Oh. There's --

14 THE COURT: -- designation rights.

15 MR. KIRBY: There's no question --

16 THE COURT: Those people have to pay their money
17 back, right?

18 MR. KIRBY: There's no question that under the plan
19 Compass kept their right to buy their interest. And before --

20 THE COURT: Right.

21 MR. KIRBY: -- the Court ruled on this motion,
22 Compass --

23 THE COURT: Bought their interest.

24 MR. KIRBY: -- did what they -- well, no. Exercised
25 their call right and said you're now obligated to sell us your

1 interest --

2 THE COURT: Right.

3 MR. KIRBY: -- and we're putting some money into
4 escrow, and presumably at that go ahead --

5 THE COURT: And the people got their money. Right?

6 MR. KIRBY: Yes. But the question is --

7 THE COURT: So if they got their money --

8 MR. KIRBY: But the question --

9 THE COURT: -- what more will they get by changing
10 servicer?

11 MR. KIRBY: Your Honor, if Compass buys 51 percent --

12 THE COURT: Right.

13 MR. KIRBY: -- for principle and interest, Vindrauga
14 isn't going to be the servicing agent anymore. We understand
15 that.

16 THE COURT: Um-h'm.

17 MR. KIRBY: And we don't contest that the plan says
18 that they can exercise their right to buy the loan, buy the
19 loan interest, even though the 51 percent have spoken. Right?

20 But what's at stake here -- and that's why -- and I was so
21 anxious to be able to explain this to you. It's all been
22 raised in replies or supplemental declarations.

23 THE COURT: I think I'd feel a little better if I
24 knew this was just individuals who had loans. You bought these
25 loans knowing they're in default. You bought many of them at

1 discounts. You did it, arguably, with a purpose so you could
2 control these loans.

3 MR. KIRBY: Well --

4 THE COURT: This is not 51 people who have gotten
5 together and says, you know, we need to change servicers.
6 You're out there to make a profit just like Compass is.

7 MR. KIRBY: But -- but --

8 THE COURT: And don't tell me you're not.

9 MR. KIRBY: This process --

10 THE COURT: You're not out there just to get your
11 money back, right? You're out there to make a profit.

12 MR. KIRBY: Of course. I mean, I --

13 THE COURT: Okay.

14 MR. KIRBY: I'm not denying that, and I'm not
15 certainly feeling sorry for my client.

16 But if this procedure is followed a particular way, then
17 when 51 percent of these people speak, then they're either
18 going to get a new loan servicer or 51 percent of the people
19 are going to get their money, principle and interest.

20 But if you allow Compass to act according to a different
21 interpretation of this plan --

22 THE COURT: Now, why is it different?

23 MR. KIRBY: They're saying that when 51 percent
24 speak, all they have to go out and do is to go out and buy 2
25 percent, and then we're in some kind of race where Vindrauga or

1 DACA, its affiliate, is out there buying --

2 THE COURT: And where is that precluded by the plan
3 or the contracts?

4 MR. KIRBY: It's precluded by Nevada law and the plan
5 because the plan preserves the lender's right to designate a
6 servicing agent. And once 51 percent designate, it takes 51
7 percent to designate another one.

8 And if your Honor interprets the plan in that way, then
9 either the servicing agent is going to change or 51 percent of
10 these people are actually going to get their money. If your --

11 THE COURT: So you're telling me that outside
12 bankruptcy -- let's assume 51 percent designate. And then
13 before they actually do a new broker -- because there's no new
14 broker selected yet. Right?

15 MR. KIRBY: Well, if 51 percent designate a
16 particular agency --

17 THE COURT: Oh, that's right. Your --

18 MR. KIRBY: -- to be their servicer --

19 THE COURT: I forgot, your client's agency.

20 MR. KIRBY: Any agency.

21 THE COURT: It was your client's agency. Right?

22 MR. KIRBY: Well, I'm here representing a client.
23 There's no doubt about it.

24 THE COURT: It was your client's agency. Right?

25 MR. KIRBY: Yes.

1 THE COURT: Okay. It wasn't some third party
2 unrelated to you.

3 MR. KIRBY: Unrelated to me?

4 THE COURT: It wasn't like Countrywide. It wasn't
5 like Ditech.

6 MR. KIRBY: Compass --

7 THE COURT: It was your client's company that,
8 coincidentally, got designated the servicing agent.

9 MR. KIRBY: Well, I absolutely think that your remark
10 in the beginning of this was true is that Compass and DACA are
11 in the same business.

12 THE COURT: That's right.

13 MR. KIRBY: All right?

14 THE COURT: You're both out to make a profit.

15 MR. KIRBY: Nobody's morally superior to anybody
16 else.

17 THE COURT: That's right.

18 MR. KIRBY: And, gosh, if I ever argue that by
19 accident, I'm sure you're going to correct me.

20 But the issue is here the procedure we're following. Are
21 we in a race that only ends when the Court finally issues an
22 order?

23 THE COURT: Now, did you --

24 MR. KIRBY: You've got 51. No, you don't. Now you
25 have 49. Now I've got 20 more or --

1 THE COURT: Did you advise these entities that
2 Vindrauga was an agency of DACA?

3 MR. KIRBY: Absolutely. That is in the designation
4 form. And, yes, we did, and I have personal of that fact.

5 THE COURT: Okay.

6 MR. KIRBY: I mean, the fact is -- and I don't want
7 to get into who's the better loan servicer. But the fact is
8 if --

9 THE COURT: And I don't care because that's beside
10 the point.

11 MR. KIRBY: Your Honor --

12 THE COURT: The issue was totally --

13 MR. KIRBY: Your Honor can look --

14 THE COURT: Yeah.

15 MR. KIRBY: -- at the loan-servicing agreement that
16 they're willing to serve under, the one that creates the
17 conflict of interest, the one that says three percent, the one
18 that has the illegal power of attorney provisions --

19 THE COURT: Well, the --

20 MR. KIRBY: -- the one --

21 THE COURT: Wait. Wait, wait, wait, wait.

22 MR. KIRBY: All that stuff --

23 THE COURT: Wait, wait. That was the --

24 MR. KIRBY: -- we amended --

25 THE COURT: Wait.

1 MR. KIRBY: -- all of that.

2 THE COURT: That was the contract that was in
3 existence that these people signed to begin with.

4 MR. KIRBY: That doesn't mean that the --

5 THE COURT: That was the --

6 MR. KIRBY: -- contract is legal.

7 THE COURT: I am tired of these blogs that probably
8 you're sending around that make the representation that this
9 Court changed the contract.

10 MR. KIRBY: We didn't know.

11 THE COURT: This Court did not change the servicing
12 contract.

13 MR. KIRBY: When have I --

14 THE COURT: The servicing contracts are the servicing
15 contracts that each of these people have entered into.
16 Correct?

17 MR. KIRBY: True.

18 THE COURT: Okay.

19 MR. KIRBY: They're illegal in some cases.

20 THE COURT: But the point was --

21 MR. KIRBY: I mean, they're --

22 THE COURT: -- they are the servicing contracts that
23 each of these individuals have entered into.

24 MR. KIRBY: No doubt about it.

25 THE COURT: Okay. I don't want you to suggest that

1 this Court somehow changed the contract at confirmation.

2 MR. KIRBY: Did I?

3 THE COURT: I thought you just said that.

4 MR. KIRBY: No. No, ma'am. No, ma'am.

5 The loan servicing agreement that they have with Compass
6 that will stay the way it is if they stay with Compass --

7 THE COURT: Is the exact contract that everybody
8 signed before.

9 MR. KIRBY: Yes. And --

10 THE COURT: Warts and all.

11 MR. KIRBY: Yes. Absolutely. And the one --

12 THE COURT: And probably good parts and all. There
13 may be something --

14 MR. KIRBY: That's right.

15 THE COURT: -- there to their advantage.

16 MR. KIRBY: And the designation form that they signed
17 with Vindrauga eliminates many of the illegal provisions and
18 takes the loan-servicing fee from three to one percent and
19 contains Vindrauga's promise that if the loan isn't paid off
20 and they have to foreclose, Vindrauga will buy them out in full
21 within 30 days after the foreclosure.

22 THE COURT: Okay.

23 MR. KIRBY: All important reasons why they might want
24 to change servicing agents.

25 THE COURT: Now, I sure don't see this designation of

1 servicing agent where it indicates that Vindrauga is a
2 subsidiary of DACA.

3 MR. KIRBY: Does your Honor want me to file a
4 supplemental declaration with copies of the solicitations that
5 went out?

6 THE COURT: That may be relevant. We'll wait and see
7 what happens.

8 MR. KIRBY: All right.

9 THE COURT: Okay?

10 MR. KIRBY: Because we certainly can. And I know
11 because I, of course, reviewed those solicitations before they
12 went out, and I can represent to the Court personally that that
13 was done.

14 THE COURT: Okay.

15 MR. KIRBY: The point here -- and I'm trying to focus
16 as laser-like as I can on this issue that the Court's
17 identified, the 51 percent.

18 Are we going to have a process here where it's 51 percent,
19 no, we bought 2, now you've only got 49? Oh, well, we bought
20 another 20. Well, now we've got 73. And this process
21 continues all the way down the line until a final hearing on
22 this motion?

23 Or does it instead work like this? If 51 percent vote to
24 change the servicer, 2 percent can't undo that. 51 percent
25 have to undo that which means that Compass has to go out and

1 buy 51 percent.

2 Now, if Compass exercises its right to buy the 51 percent
3 and closes, then Godspeed to them. All right?

4 But anything short of that what they're trying to do is do
5 an end run around that requirement. They're trying to get away
6 with not paying 51 percent of the direct lenders their
7 principle and interest.

8 So do it the way that my client says it should be done --

9 THE COURT: Now, but your clients bought some. How
10 much do your clients hold?

11 MR. KIRBY: My client holds I believe about 24
12 percent of the loan.

13 THE COURT: 24 percent. You bought it full and
14 probably discount.

15 MR. KIRBY: Absolutely, your Honor.

16 THE COURT: Okay. And then the rest of these people
17 you got designations for weren't paid anything.

18 MR. KIRBY: That's right.

19 THE COURT: Okay.

20 MR. KIRBY: That's correct.

21 So do it the way and the procedure that we're suggesting,
22 and the motions are simple. Did you have a right on the
23 petition date to change loan servicers, and did 51 percent
24 vote. All right? If those two things are true, and Compass
25 has the right to contest either one of them, then motion

1 denied, Compass.

2 But you say to Compass -- Compass doesn't need to be
3 reminded, but you can say, anyway, close 51 percent, purchase
4 51 percent, and then you're the loan servicer again.

5 And, your Honor, if you deny it because this is unclear
6 and because this issue was raised in a -- not even in a reply,
7 but a supplement to a reply. If your Honor wants to stay the
8 effectiveness of her order denying this motion for a period of
9 30 days to let them close, then fine.

10 We recognize absolutely their right to buy up 51 percent
11 of this loan and designate themselves back as servicer, but
12 what we think is unfair and not beneficial to the direct
13 lenders who aren't my clients, but, nevertheless, the Court's
14 looking out for them, is that they can go in and cherry pick 2
15 percent, 10 percent, 30 percent like Mr. Blatt has and retain
16 control of the loan when 51 percent have voted to remove them
17 as servicer.

18 And that's all I'm saying, and that's what I wanted to
19 have a chance to say.

20 THE COURT: Okay. All right.

21 Response?

22 (Colloquy not on the record.)

23 MR. DAVIS: Your Honor, I just want to remind you the
24 -- I don't know if -- well, I'm sure you do remember the hours
25 and hours and days of confirmation hearing that we had before

1 your Honor trying to deal with all of the objections to the
2 sale and the plan.

3 And I specifically recall Mr. Merola standing before your
4 Honor at the confirmation hearing and said, your Honor, guess
5 what? Compass made a huge concession which will help
6 facilitate getting this plan confirmed.

7 They're still going to pay us the same amount of money,
8 the 67-some-odd million dollars that they agreed to pay, but
9 rather than require that they take these interests, that they
10 take the agreements free and clear of all monetary and
11 nonmonetary defaults, period, they have agreed to this concept
12 of a surviving Section 3 right. Huge concession, Mr. Merola
13 described to your Honor.

14 The reason we did it is for this very reason, so that --
15 well, we did it because we didn't could get the plan confirmed,
16 but we did it in a context of the protections that were built
17 into the order surrounding the survival of that right, namely,
18 that it had to be on notice to us. There had to be 30 days
19 notice.

20 The confirmation order expressly preserves our right to
21 purchase direct-lender interests, notwithstanding the exercise
22 of a surviving Section 3 right pursuant to Section 2(c)(3) of
23 the loan-servicing agreement. And, most importantly, it also
24 provides that any attempted exercise is stayed until your Honor
25 enters an order finding that there is a subsequent servicer and

1 that it has been and is effective.

2 The fact is we purposely with complete input from the
3 creditors committees and with the debtor designed this process
4 for exactly the reason why we're here today.

5 Compass has gone out of pocket and purchased for over
6 \$12,000,000 the interests of these parties. The reason they
7 did it is because it wants to complete the process that it has
8 embarked upon in terms of resolving this loan, a loan for which
9 it purchased the right from these estates to be the servicer
10 for and the accrued servicing fees for which it has purchased
11 and paid real dollars to this estate.

12 Remember, these are loans that, you know, have been
13 serviced by a servicing company that has been accused of
14 significant wrongdoing and for which significant defaults were
15 alleged to have occurred.

16 We paid \$67,000,000 to become the subsequent servicer so
17 that we could then service the loans, recover the amounts that
18 were accrued in terms of fees and, you know, and ultimately,
19 yes, make a profit.

20 But, importantly, the process that's in here was designed
21 to protect us against allowing a surviving Section 3 right. It
22 was very, very carefully crafted. It was negotiated for a long
23 period of time with the debtors and the committee, and it was
24 done for this very purpose.

25 We let it happen. We let that right survive because we

1 knew that if someone attempted to exercise it, we had the right
2 to purchase enough interests from the lenders that wanted to
3 change servicer to stop it from happening to protect our
4 investment which is the \$67,000,000 we paid to the estate.

5 That's exactly why the order is crafted the way it is, and
6 that's exactly why we have the right to do what we're doing,
7 and we will continue to come back to your Honor and do this for
8 every single time DACA tries to replace us as loan servicer.
9 We'll be back before your Honor with this very same point.

10 We're protecting our investment. We've paid these people
11 dollars today, every dollar that they are due, 100 percent of
12 the principle, 100 percent of the interest, and they have the
13 money today.

14 DACA wants you to undo that and basically have these
15 people go back, let them be the loan servicer. These people
16 will presumably have to forfeit their -- or return the money.

17 I'm not sure what would happen in that scenario. I
18 haven't, frankly, given it much thought because I never thought
19 that -- I never conceived that it would be a possibility that
20 people would have to return the money that Compass has paid to
21 them.

22 But suffice it to say, this is -- that the process for
23 dealing with what DACA has been attempting to do for six months
24 prior to the closing date which is to replace us, again, by
25 purchasing interest at a discount and then promising to buy --

1 the interesting thing is if you look at their loan-servicing
2 agreement and the designation, they only agree to actually pay
3 and buy the interest of these people if the liens are bid in at
4 the foreclosure.

5 The reason is, your Honor, if the liens are bid in at the
6 foreclosure, they get a \$215,000,000 property for the amount of
7 the debt. Of course, that's the end game.

8 And when they say, you know, Compass has a three percent,
9 well, we -- or one percent or whatever it is, it is whatever
10 the contracts were that USACM and the direct lenders entered
11 into. We haven't changed them.

12 And Vindrauga also as part of their solicitation has, you
13 know, given the option of lenders to pay them six percent
14 interest -- six percent servicing fee on the loan, and then
15 allowing the direct lenders I guess at that point to keep any
16 default interest and late charges that might be collected.

17 Your Honor, they have orchestrated this in a way --
18 there's another point that I want to bring to your Honor's
19 attention.

20 Your Honor will recall that in the confirmation order
21 there was another protection that we had, you know, asked for
22 and your Honor gave us which is any subsequent servicer can't
23 compromise, waive, or subordinate any of the fees that are due
24 to Compass and for which it purchased from the estate.

25 Essentially, the way this has been structured is to buy

1 these participation interests upon a successful foreclosure at
2 the principle plus the accrued nondefault interest, so that
3 they're structured in a way that effectively -- they will never
4 have to pay the default interest and late charges that would
5 come to Compass, anyway.

6 So, essentially, they've subordinated our -- attempted to
7 subordinate our right to default interest and late charges
8 through the contract that they're having these people sign.

9 It's wrong. It violates your Honor's confirmation order.
10 You know, it is completely unfair considering the consideration
11 that's been paid by Compass, and we are fully within our rights
12 under the confirmation order in buying a sufficient number of
13 interests to prevent this very injustice from happening.

14 Thank you, your Honor.

15 THE COURT: Okay.

16 MR. KIRBY: Your Honor, just one minute.

17 THE COURT: No. I don't think so. I won't consider
18 that last point about whether or not the -- what the new
19 contracts do, so you don't need your --

20 MR. KIRBY: I had omitted one thing that --

21 THE COURT: All right.

22 MR. KIRBY: Thank you for your indulgence. I'm not
23 going to respond to those remarks.

24 There's another issue which I neglected to mention because
25 I was so wrapped up in putting this 51-percent point across,

1 and that is there's a licensing issue now.

2 Mr. Davis will have to tell you that within the last --

3 THE COURT: I don't see that in your opposition
4 anyplace, Counsel.

5 MR. KIRBY: Licensing is briefed in the opposition,
6 your Honor, and this --

7 THE COURT: I don't think you raised that as a --

8 MR. KIRBY: Well, your Honor, within the last two
9 days, right, Compass has been served with a cease and desist
10 order by the Nevada -- state of Nevada.

11 THE COURT: Where is that in your opposition?

12 MR. KIRBY: My opposition wasn't filed less than two
13 days ago.

14 THE COURT: So where's your supplement?

15 MR. KIRBY: If your Honor isn't interested in whether
16 they're licensed, that's fine.

17 THE COURT: Counsel --

18 MR. KIRBY: The cease --

19 THE COURT: -- I just don't appreciate let's come up
20 here -- oh, I forgot something, and you throw out these issues
21 at the last minute.

22 What are we supposed to do now? I let counsel have
23 another half hour to respond to this?

24 MR. KIRBY: Well --

25 THE COURT: I then figure out what the legal issue

1 is?

2 MR. KIRBY: Well, would your Honor enforce then her
3 policy about raising new issues in replies and supplements to
4 replies? Because if so, we don't have anything to argue about
5 here. Right?

6 THE COURT: But what is --

7 MR. KIRBY: They intentionally --

8 THE COURT: I mean, I understand the like --

9 MR. KIRBY: They intentionally sandbagged us on the
10 reply, and your Honor knows that. So if there are two -- if
11 there's a double standard here, fine.

12 I'm saying -- and Mr. Davis can get up here and deny it.
13 Right? I'm saying that within the last two days -- and I found
14 out about this yesterday afternoon.

15 THE COURT: But they have the right to use an
16 out-of-state licenser.

17 MR. KIRBY: Their out of -- their -- how does
18 your Honor know that? I'm just saying they've been served with
19 a --

20 THE COURT: Because they've told me that at a --

21 MR. KIRBY: -- cease and desist order by the state of
22 Nevada --

23 THE COURT: -- hearing that you probably weren't at.
24 That was at confirmation.

25 MR. KIRBY: Apparently, the state of Nevada feels

1 differently, so I'm raising this. If it's a matter of
2 indifference to the Court about whether they have a license --

3 THE COURT: Counsel, I disapprove of that kind of
4 comment. What do you mean indifference?

5 I'm trying to deal with the legal issues. You've raised a
6 legal issue that you did not raise before. If you want to
7 bring a motion, if it's relevant to something, then bring it.

8 MR. KIRBY: All right.

9 THE COURT: Don't tell me I'm indifferent.

10 MR. KIRBY: Then what I'll do -- then what I'll do
11 since this is a matter that came up completely too late to
12 raise in any papers -- I found out about it yesterday afternoon
13 while I was -- an hour before I got on the airplane to come
14 here -- is I'll file a motion for reconsideration based on this
15 new matter, and we'll consider it.

16 And I was informing the Court of what I learned yesterday.
17 I sat there for five minutes while Mr. Davis testified about
18 all kinds of facts. All right?

19 If that's the way that we need to do it, that's the way
20 we'll do it.

21 Thank you.

22 THE COURT: All right. I appreciate Mr. Kirby's
23 frustration about not understanding the process, and I think
24 what we need to do is clarify the order of confirmation.

25 From the order of confirmation and all that happened at

1 confirmation, it is apparent that we need to go back. The
2 issue is whether or not these were executory contracts. I've
3 found they weren't executory contracts.

4 The question was how, then, the assets were sold free and
5 clear of liens. The question at confirmation became what does
6 that mean.

7 Arguably, selling free and clear of liens and claims could
8 mean that notwithstanding the severe default of USA Commercial
9 prepetition, the direct lenders would not have any rights to
10 change servicers postpetition. None. Period.

11 And when DACA bought its interest, it knew that that was
12 indeed possible. However, at confirmation issues were raised,
13 is that appropriate, is it not.

14 And Compass agreed to a compromise. It agreed to the
15 compromise that, all right, we will take subject to prepetition
16 defaults insofar as they relate to the servicing.

17 And I need to read that language because that's important.
18 Which pleading is that? Oh, Compass is not -- there it is.

19 There was a surviving right, and that provided that "it
20 was free of all claims and interests and liens except "any
21 right that existed and was matured and exercisable as of the
22 petition date to effect a substitution to USACM as a loan
23 servicer under Section 3 as well as any defenses of the loan
24 servicer."

25 And then there was a procedure to determine this, and the

1 procedure expressly gave them the right to challenge that and
2 suggested there be a hearing to oppose it.

3 I think reading all this together and conceding that the
4 right to the contract includes the rights to buy loans on
5 behalf of the servicer, I believe the appropriate way to read
6 the plan is to hold that the one who effects to change the
7 service must have 51 percent approval of those who are loan
8 holders who are direct lenders as of the date of the hearing.
9 In essence, that becomes the record date.

10 Now, to make things easier in the future -- and this
11 hearing had a tortured history because of calender problems,
12 trying to get to the calendar -- I think the record date would
13 be, if you will, 30 days after the motion is filed.

14 That way you know if you think you have 50 percent,
15 they're going to go out and they know what the deadline is, and
16 you can go out and acquire some more as well.

17 But I think that establishes a procedure that takes into
18 account the compromise that was made but recognizes the right
19 of the servicers to change based upon this compromise.

20 It makes no sense to me to suggest that even if somebody
21 said, okay, I want to change servicer and they're now bought
22 out, what interests do they have anymore. That's the anomaly.

23 I appreciate your frustration, Mr. Kirby. You say, well,
24 I got my 51 percent. But on the other hand, you now have the
25 loan controlled by people who didn't really have 50 percent as

1 of the day the change was made because they didn't own the loan
2 anymore.

3 And I think that's probably the way the law would work
4 under the state law. That is, you would look at right before
5 the loan -- the new contract was signed with the new company.
6 Here we have this anomaly because we have this 30-day hold.

7 So the record date, if you will, will be 30 days after
8 Compass would file its motion regardless of when they hold the
9 hearing. The hearing will be sometime after the 30 days, but
10 that will be the record date, if you will, and that solves that
11 issue.

12 I make no comments that may be a very legitimate concern
13 about whether or not they're not licensed. My point is that's
14 not before me today.

15 If it's a valid concern, file your motion. That is if
16 it's -- you know, I don't know what the effect is. I don't
17 know what the Nevada licensing requirements are. I don't know.
18 I have heard at one of these hearings that the servicers intend
19 to use a non-Nevada servicing agency.

20 I know the U.S. Supreme Court has certainly restricted
21 state regulatory actions as it relates to certain institutions.
22 Whether or not this would apply to these institutions I don't
23 know. Those are all issues that are brand-new.

24 So that's the issue. It seems to me that they have
25 conceded that, yes, there was a default such that if

1 Mr. Kirby's clients did have 51 percent as of today, then the
2 contract can be changed. If --

3 MR. KIRBY: Only one point of clarification, please.

4 THE COURT: And I'll let you go investigate that.

5 MR. KIRBY: I understand.

6 Does that mean that they have closed and have obtained the
7 assignments to take us under --

8 THE COURT: Yes. I think it means -- and then you --
9 maybe you can argue what the contract means, but my
10 understanding right now would be they have to have the
11 assignment.

12 If they have an argument that, well, the contract says
13 they've got to turn it over, that may be an issue, but that's
14 something you probably should look at and brief together first.

15 MR. KIRBY: Thank you, your Honor.

16 THE COURT: So that's my initial reaction.

17 MR. KIRBY: Thank you.

18 MR. DAVIS: Okay. But there's no ruling --

19 THE COURT: My initial reaction is it's --

20 MR. DAVIS: No ruling today as to --

21 THE COURT: -- actually have the assignments.

22 I'm willing to listen to their arguments based upon the
23 contract and what they have, but that's something that, you
24 know, is legal issues that you reserve the right -- you deserve
25 the right to respond to.

1 MR. KIRBY: Thank you, your Honor.

2 THE COURT: Okay. Thank you.

3 MR. DAVIS: Thank you, your Honor.

4 THE COURT: All right. So let's go next to
5 USA Commercial in the Reale and HMA matter.

6 (Colloquy not on the record.)

7 THE COURT: Well, I'll tell you what. Let's take a
8 two-minutes break so those of you that want to leave certainly
9 may.

10 MR. DAVIS: Thank you, your Honor.

11 THE COURT: You can change positions.

12 THE CLERK: All rise.

13 (Court recessed at 10:42:45 a.m.)

14 (Court reconvened at 10:51:55 a.m.)

15 THE CLERK: Bankruptcy court is now in session.

16 THE COURT: Be seated. Okay.

17 In the HMA Sales matter.

18 MS. LARSEN: Cynthia Larsen representing Diversified
19 Trust Deed Fund.

20 MS. LORADITCH: Good morning, your Honor.
21 Anne Loraditch of Beckley & Singleton, Chartered, Nevada
22 counsel for Diversified Fund.

23 MR. GERRARD: Douglas Gerrard, Gerrard, Cox & Larsen,
24 on behalf of Mr. Reale.

25 MR. GORDON: Gerald Gordon of Gordon & Silver,

1 proposed counsel to HMA Sales, LLC, a Chapter 11 debtor before
2 this Court.

3 MR. LANDESS: Good morning, your Honor.

4 Jason Landess representing Great White.

5 MR. LANDIS: Good morning, Judge. Augie Landis,
6 Assistant United States Trustee.

7 THE COURT: Okay. And, Mr. Gordon, would you let
8 Mr. Garman know on that matter. He wanted an emergency
9 hearing.

10 MR. GARMAN: I'm right here, your Honor.

11 THE COURT: Oh.

12 MR. GARMAN: Hiding.

13 THE COURT: Hiding behind the computer.

14 MR. GARMAN: Excuse me, your Honor.

15 THE COURT: Friday's not going to work. Friday I'm
16 in sessions all day. Maybe Thursday. Maybe Monday. I'd
17 prefer you avoid it if at all possible, but Friday will not
18 work, so I'll let you -- I'm waiting to hear back what my
19 responsibilities are on the 17th. Maybe the 21st.

20 THE CLERK: Did you want that telephonic, Judge?

21 THE COURT: It's going to have to be. I mean, I'm
22 not here.

23 THE CLERK: (Indiscernible) --

24 THE COURT: You know what? Let's just do it the 21st
25 at -- can you do it at 8:30?

1 MR. GARMAN: Sure.

2 THE COURT: Is that a problem for here, Eileen?

3 THE CLERK: I don't think so.

4 THE COURT: Okay. I mean, I know you're not here,
5 so --

6 THE CLERK: On the 21st?

7 THE COURT: -- no, it's no problem at all.

8 THE CLERK: The 21st, right?

9 (Colloquy not on the record.)

10 THE COURT: Oh, you are. Okay. So does 8:30 work
11 okay?

12 THE CLERK: That's fine.

13 THE COURT: Okay. So we'll do it the 21st at 8:30.

14 MR. GARMAN: Okay. Thank you, your Honor.

15 THE COURT: And I'll let you know. I might be able
16 to use somebody's chambers. All right. Okay.

17 Go ahead.

18 MR. NEVINS: Excuse me, your Honor.

19 THE COURT: Uh-huh.

20 MR. NEVINS: This is Howard Nevins.

21 THE COURT: Sorry. Appearances on the telephone.
22 I'm so sorry.

23 MR. NEVINS: Howard Nevins of Hefner, Stark & Marois,
24 Sacramento, California, appearing for defendant National Real
25 Estate Holdings.

1 THE COURT: Okay.

2 MR. NEVINS: Thank you.

3 THE COURT: Part of the reason of one of these
4 matters is because I was unclear. When the injunction came, I
5 had disapprovals, but I had no objections actually filed by
6 anybody.

7 I understand from my clerk that Mr. Gerrard was willing to
8 go along with the injunction, but I'm just trying to understand
9 what -- on the injunction order where we are and if there are
10 disapprovals and if there's a formal order we can agree to in
11 the interim.

12 MS. LARSEN: Your Honor, just one point of
13 clarification. Mr. Sylvester is willing to go along with the
14 writ-of-attachment order against USREG (phonetic). He was not
15 affected by the -- his client was not affected by the
16 preliminary-injunction order.

17 THE COURT: Okay. So you can resubmit that one,
18 then, if it's --

19 MS. LARSEN: Yes. It has been --

20 THE COURT: -- not there.

21 MS. LARSEN: -- uploaded already.

22 THE COURT: Okay. Thank you.

23 MR. GERRARD: Your Honor, let me just address that.
24 What I had indicated to your deputy court clerk is that we had
25 no problem with the writ-of-attachment order. Ms. Larsen made

1 the changes that we felt were appropriate to it.

2 We continued to have disagreement over the language of the
3 preliminary-injunction order, the reason being that there were
4 really -- there was this outstanding issue that your Honor had
5 raised at the last hearing with respect to, you know, the
6 overreaching nature of going out and serving this on
7 nonparties, and then the language that followed therefrom which
8 your Honor indicated you had a problem with and wanted to see
9 some subsequent legal authority, and some was provided by
10 Mr. Larsen and Ms. Loraditch.

11 THE COURT: But it wasn't filed.

12 MR. GERRARD: I don't know if they filed it or not.
13 I'm just saying I know I saw something.

14 THE COURT: Okay.

15 MR. GERRARD: I can't speak to whether they submitted
16 it to the Court.

17 MS. LORADITCH: (Indiscernible).

18 MS. LARSEN: Your Honor, it was filed with the Court.

19 THE COURT: Was it filed in the Reale case or --

20 MS. LORADITCH: It was electronically filed
21 April 25th.

22 THE COURT: In which case?

23 MS. LORADITCH: The adversary 01256. It's entitled
24 Plaintiff's Memorandum of Authorities Regarding Application of
25 Federal Rule of Civil Procedure 65(d) to Nonparty --

1 THE COURT: I just looked yesterday and didn't see
2 it. I might have just overlooked it. I apologize because I
3 looked, and I didn't see it. All right.

4 Go ahead, in the meantime.

5 MR. GERRARD: Well, your Honor, I did see what they
6 submitted.

7 THE COURT: Okay.

8 MR. GERRARD: And I did read the couple of cases that
9 they cited. And although in those cases it was permitted that
10 there be some service on outside financial institutions, there
11 was nothing in the language of those cases that allowed what
12 they have proposed to do in this case.

13 And I told Ms. Larsen that, you know, in some E-mails that
14 I sent back and forth to her and some conversations that I had
15 with her that because your Honor was willing to give us that
16 expedited trial setting and you made that one of the conditions
17 to, you know, the minimal amount of the bond that was required
18 and to granting the injunctive relief to begin with.

19 Because your Honor had done that, I told Ms. Larsen we
20 will not object to your going out and serving the third-party
21 financial institutions because we're only talking about a
22 matter of a few weeks now before our trial date.

23 However, the second part of what she put into her language
24 of the order as your Honor may recall, and I'm sure you have it
25 in front of you, it also says that once this is served, that

1 each of these financial institutions is authorized and ordered
2 to confirm in writing to Cynthia Larsen at her fax number and
3 her address the identity and balance of any deposit accounts
4 and the description and estimated value of any other assets of
5 an enjoined defendant held by it.

6 And I just explained to Ms. Larsen, I said that is so
7 overreaching. What you're essentially doing --

8 THE COURT: Now, is this one I actually then signed
9 or is it -- I had understood that you had no objection, so I
10 did sign one order, but the injunction --

11 MR. GERRARD: No. You --

12 THE COURT: -- has not been signed. Right?

13 MR. GERRARD: No.

14 THE COURT: Right.

15 MR. GERRARD: This order you did not sign.

16 THE COURT: Okay.

17 MR. GERRARD: This is the one we marked as
18 disapproved.

19 THE COURT: Okay.

20 MR. GERRARD: The other one you entered, the
21 writ-of-attachment order, was entered.

22 THE COURT: Okay.

23 MR. GERRARD: And, your Honor, what I explained to
24 Ms. Larsen is the same thing I'm telling your Honor now. Even
25 if your Honor was willing to allow them to go well beyond what

1 I think is normally allowed in serving third parties, to
2 suggest that they can circumvent all the discovery rules and to
3 simply serve this thing upon any financial institution they
4 want, and then that financial institution is supposed to report
5 back to them any personal information on any accounts that my
6 client might have had at that institution without my client
7 even having notice of it is just ridiculously overreaching.

8 And I explained to Ms. Larsen there's no basis for that.
9 The Court never ordered that, and, in fact, your original
10 motion never even requested that. It's just what you put in
11 the order.

12 And so I said I cannot agree to that. I said even if I'm
13 willing to overlook this serving on the third-party banks
14 because of our short time before the trial, I cannot overlook
15 this.

16 They could take that and serve it on anybody anywhere and
17 have that person report back to them financial information or
18 personal information to my client, and we would never even
19 know.

20 I mean, it completely circumvents all the discovery rules
21 and all the rules with respect to writs of attachment even, you
22 know, prejudgment or postjudgment, and I just said it's so
23 overreaching I just cannot allow that to go forward.

24 So that's the reason I asked her to mark disapproved from
25 me on the preliminary-injunction order because I just couldn't

1 go that far.

2 The other thing that we did work out, your Honor, that I
3 just want to make note of is that -- and this related to the
4 injunction and the attachment.

5 The attachment order they were saying they could attach up
6 to 9.9 million dollars of property because that's the amount my
7 client received from the sale of the Royal Hotel.

8 And what we said is the injunction is already enjoining,
9 you know. At least we know of one bank account that has
10 six-and-a-half-million dollars in it.

11 So in that writ of attachment you need to reduce that
12 amount from 9.9 million to the difference between the
13 six-and-a-half million that's in the bank account, right, and
14 the 9.9 million because you can't go above that. That's the
15 maximum amount of your claim against my client.

16 And we were able to work something out on that, so I don't
17 want to make it sound like they are totally unresponsive to the
18 things that we had requested, but I still think this is so
19 overreaching.

20 THE COURT: Okay. Mr. Landess, any additional --

21 MR. LANDESS: I'll just --

22 THE COURT: -- comments?

23 MR. LANDESS: I'll just --

24 THE COURT: Because you disapproved as well.

25 MR. LANDESS: I'll just add a footnote to what

1 Mr. Gerrard had to say. I join in exactly his point with
2 respect to the information that she's seeking, and there's a
3 very good reason why, and I'll leave this to Mr. Gordon, and
4 he'll amplify on this.

5 The parties haven't had a 26(f) conference in this. And
6 so when you're trying to seek information from anyone, as you
7 know under 26(d), it says that a party is prohibited from
8 seeking discovery from any source, this is just a disguised
9 subpoena, if you will.

10 And they can't until we've -- at least until we've had a
11 26(f) conference seek information from any source, and they're
12 prohibited by 26(d) until that occurs.

13 Thank you.

14 THE COURT: Okay. Mr. Gordon, I guess you had a
15 comment first?

16 MR. GORDON: Your Honor, and I don't mean to throw a
17 wrench in all this, but --

18 THE COURT: Well, let me deal with this order first,
19 and then --

20 MR. GORDON: But --

21 THE COURT: -- let's deal --

22 MR. GORDON: But the order --

23 THE COURT: -- with the other issue.

24 MR. GORDON: But, first, let me raise it in this
25 context.

1 THE COURT: Well, you didn't even respond.

2 MR. GORDON: No. But let me raise it in this
3 context, and don't yell because we're going to try to have a
4 solution to this.

5 HMA filed bankruptcy yesterday evening. HMA has filed an
6 answer and cross-claims to the second amended complaint. We
7 filed that also after we filed the petition last night.

8 I will tell the Court, as the Court is aware, given that
9 HMA is a defendant in this action -- and I'm just going to
10 throw this out -- part of our concern is is that there is an
11 automatic stay now in place with regard to all matters
12 involving HMA.

13 We filed our answer knowing that because it's not our
14 intention --

15 THE COURT: Well --

16 MR. GORDON: -- (indiscernible) --

17 THE COURT: -- I wanted to deal with this after I got
18 this order satisfied.

19 MR. GORDON: I just want that issue in place. That
20 there is a concern by us, though we support the motion -- the
21 position taken by Diversified with regard to the discovery, but
22 we need then to address the more important issue of the
23 overarching issues.

24 THE COURT: I understand that.

25 MR. GORDON: Thank you.

1 MS. LARSEN: And, your Honor, first, I'd like to
2 point out that there were no formal objections filed to our
3 proposed order as required --

4 THE COURT: But why are you putting things that
5 weren't discussed at the hearing in orders? You were warned
6 against that the last time.

7 MS. LARSEN: Well, your Honor, you're mistaken about
8 this. Can I just -- can I explain?

9 At the last hearing, your Honor indicated that you wanted
10 us to provide authority for the provisions that were in the
11 order with respect to service of the preliminary injunction on
12 banks within 48 hours which we did.

13 Those authorities make it quite clear, and I believe
14 that's why we are not hearing any objection this morning to the
15 service on banks, that what we had proposed was completely
16 permissible and, in fact, what Rule 65 envisions.

17 THE COURT: But you never ask in your motion to go
18 farther about the identity and balance of deposit accounts.

19 MS. LARSEN: Your Honor, that's what this proposed
20 order has said all along. That's what it said the last time.

21 THE COURT: You didn't say it --

22 MS. LARSEN: There was no objection.

23 THE COURT: -- in the motion.

24 MS. LARSEN: Your Honor, there was no objection to
25 that specific provision of it --

1 THE COURT: Where was that --

2 MS. LARSEN: -- when the written objections --

3 THE COURT: -- in your original motion?

4 MS. LARSEN: That was in the TRO. That goes way
5 back, your Honor. When you entered the TRO that was way back
6 in January --

7 THE COURT: That the banks had to identify the
8 balance of deposit accounts, the description and estimated
9 value of other assets?

10 MS. LARSEN: That's been in the TRO. That has been
11 in place from the very beginning, and the reason that that's
12 important, your Honor -- well, it's obvious that you can't
13 enforce a preliminary injunction without knowing.

14 Moreover, there's case law. And since this wasn't a basis
15 for any written objection or any objection at all until after
16 the last hearing --

17 THE COURT: But they --

18 MS. LARSEN: -- on the 23rd --

19 THE COURT: But they talked to you about it.

20 MS. LARSEN: They did, and that's -- and here I am
21 with authority as to why that specific language requiring the
22 banks to indicate what they're holding if they do, in fact,
23 have an account or assets of the enjoined defendants is
24 permissible.

25 Reebok versus Marnatech, 737 F. Supp. 1521, as part of the

1 preliminary-injunction order, statements were to be provided to
2 the --

3 THE COURT: Did you ask --

4 MS. LARSEN: -- moving entity.

5 THE COURT: -- for that in your motion for
6 preliminary injunction?

7 MS. LARSEN: Yes, we did.

8 THE COURT: Okay. So show me where motion for a writ
9 of -- approval of procedures. I don't know why you're calling
10 it a motion for approval of procedures. Writ of attachment,
11 partial summary judgment -- which docket number is it? Do you
12 know?

13 MS. LARSEN: No, I don't, your Honor.

14 THE COURT: I mean, I -- you may not know offhand.

15 MS. LARSEN: No, I don't.

16 THE COURT: Does anyone know?

17 MS. LARSEN: Your Honor, at the last hearing, you
18 specifically indicated we could leave that frivolous provisions
19 in the order, and I can cite you the transcript on that, and
20 I'd be happy to do that.

21 THE COURT: All right. Show me the transcript.

22 MS. LARSEN: Okay. Your Honor, you said on page 87
23 of the transcript of the hearing on April 23rd, 2007 --
24 Mr. Gerrard said, "We would request that your Honor strike the
25 language" -- this was the language about service on the

1 banks -- "the whole paragraph, and they can submit a subsequent
2 order later on."

3 The Court said, "Let's do this. This order is already in
4 effect. There aren't major changes in this -- in the
5 injunction. We'll leave it in place. But unless they supply
6 me with -- excuse me -- cases within two business days that
7 show that the paragraph is appropriate, that will be stricken.
8 And in the meantime, they're ordered not to serve that
9 injunction on any banks," and we did that.

10 THE COURT: But show me in the prior injunction where
11 the order is about the identity that each institution is
12 ordered to confirm in writing by a facsimile the identity and
13 balance of any deposit account.

14 MS. LARSEN: Are --

15 THE COURT: Show me the part --

16 MS. LARSEN: Are --

17 THE COURT: -- where it says that.

18 MS. LARSEN: Are you talking about in the initial TRO
19 or in the --

20 THE COURT: In any of the orders.

21 MS. LARSEN: It is clearly in there, your Honor. I
22 didn't believe that this was going to be at issue, so I don't
23 have a copy of the TRO at hand --

24 THE COURT: Do you --

25 MS. LARSEN: -- but I do happen to --

1 THE COURT: Was it in there, Mr. Gerrard?

2 MR. GERRARD: No, your Honor. It --

3 THE COURT: I sure as heck don't remember --

4 MR. GERRARD: What --

5 THE COURT: -- seeing this.

6 MR. GERRARD: What was in the order that we
7 stipulated to -- because you remember this was a stipulation
8 where we agreed to keep this in place for a period of time to
9 allow an evidentiary hearing to take place and some discovery
10 be done before that.

11 And what we did is we identified a specific account --

12 THE COURT: Right.

13 MR. GERRARD: -- the one that the 6.7 million dollars
14 was it, and we said they could confirm that specific account.
15 That's what we agreed to. That's all that we agreed to.

16 And with respect to what happened at the last hearing, you
17 just heard Ms. Larsen read what actually happened. Your Honor
18 had a problem with that entire paragraph.

19 And they were to provide some legal authority that
20 supported their position within 48 hours. What they provided
21 within 48 hours said nothing about the right to ask banks to
22 provide information back to them about what was contained in
23 the accounts.

24 What they provided was a couple of cases that said that in
25 those cases the Court thought that it was appropriate to allow

1 them to serve the injunction on some banks.

2 THE COURT: Yeah. And the problem here is you didn't
3 give me a courtesy copy, so I didn't realize you had even filed
4 it.

5 MS. LARSEN: No. We did provide a courtesy copy.

6 THE COURT: I never got it.

7 MS. LARSEN: Ms. Loraditch provided it.

8 MS. LORADITCH: Your Honor, we did send it over. I
9 don't have the run slip. I'm happy to send that over later
10 today, but we did send a courtesy copy because we were aware of
11 the time deadline and your Honor's concern that we get that
12 over within the two business days.

13 MR. LANDESS: And, your Honor, you might recall the
14 original temporary restraining order --

15 THE COURT RECORDER: I'm sorry, Counsel. I need you
16 to --

17 MR. LANDESS: -- that you (indiscernible) --

18 THE COURT RECORDER: -- speak into a microphone --

19 THE COURT: You need to -- wait, wait, wait.

20 THE COURT RECORDER: -- please.

21 THE COURT: You need to be at a microphone,
22 Mr. Landess.

23 MR. LANDESS: Your Honor, you might recall the
24 original temporary restraining order. The reason that I
25 believe your Honor took umbrage with this whole thing was

1 because in the original temporary restraining order that was in
2 effect, it was explicitly crossed out, the paragraph with
3 respect to service upon the financial institution.

4 THE COURT: Oh, that's right.

5 MR. LANDESS: And so I can't imagine how they can
6 stand here and say that that language was in the original order
7 when that was explicitly crossed out.

8 MS. LARSEN: Your Honor, it was in the original order
9 that was --

10 THE COURT: Somebody give me a copy of the order
11 you're talking about.

12 MS. LARSEN: Your Honor, I did not bring that order
13 with me today.

14 THE COURT: All right. Well, then, we'll take a
15 recess --

16 MS. LARSEN: We'll --

17 THE COURT: -- and go --

18 MS. LARSEN: We'll be happy to provide it.

19 THE COURT: -- pull it off.

20 MS. LARSEN: Okay.

21 THE COURT: Tell me what docket number it is and pull
22 it off.

23 We'll take a recess.

24 THE CLERK: All rise.

25 (Court recessed at 11:09:14 a.m.)

1 (Court reconvened at 11:21:09 a.m.)

2 THE CLERK: Bankruptcy court is now in session.

3 (Colloquy not on the record.)

4 THE COURT: All right. Be seated.

5 (Colloquy not on the record.)

6 THE COURT: All right. I see the temporary
7 injunction that I issued, and it did have the provision that
8 each institution was authorized to confirm the identity and
9 balance of any account.

10 MR. GARMAN: Is that the one, your Honor, that was
11 entered without notice at the very beginning of the case?

12 THE COURT: No. This is the one entered April 17th.

13 MR. GARMAN: Oh, okay. So that's the one that you
14 entered --

15 THE COURT: That --

16 MR. GARMAN: -- just the interim without us ever
17 having an opportunity to -- that was just their order that --

18 THE COURT: Right. And then we argued about it.

19 MR. GARMAN: Right. That's the order they just
20 submitted through.

21 THE COURT: And I guess Ms. Larsen's claiming you
22 didn't specifically object to that aspect of the order.

23 Is that what you're claiming?

24 MS. LARSEN: That's correct, and I can give you the
25 citations as to where he did not object and what the issue was.

1 THE COURT: But you're not claiming it wasn't in the
2 -- you're not claiming it was in the prior order.

3 MS. LARSEN: Me? I'm claiming it was in the
4 temporary restraining order, and that's the stipulated one, and
5 that's what's going to be coming in --

6 MR. GERRARD: No.

7 MS. LARSEN: -- here momentarily.

8 MS. LORADITCH: (Indiscernible).

9 THE COURT: So which docket number is he -- so you
10 claim it was in the temporary restraining order.

11 MS. LARSEN: Yes. (Indiscernible).

12 MS. LORADITCH: The stipulated order is Docket
13 No. 19. Mr. Landess just went up to run off a copy, and then I
14 have my runner coming over with copies for your Honor if you
15 need one as well.

16 THE COURT: Okay. There's a stipulated that says,
17 "The institution shall confirm the amount on deposit."

18 MR. GERRARD: And we talked about a specific
19 identified account. It's even I think a defined term, and you
20 have the advantage because I don't have it in front of me, but
21 that's my recollection, your Honor.

22 THE COURT: Yes. The identified account --

23 MS. LARSEN: And --

24 THE COURT: -- and that was a defined term.

25 MS. LARSEN: And it was identified by the banks.

1 THE COURT: Okay. So now you've expanded it to say
2 any deposit account.

3 MS. LARSEN: Well, where there is an account. If
4 they have --

5 THE COURT: But where did you ask that it be any
6 account as opposed to the identified account?

7 MS. LARSEN: Well, it's the same thing. If you
8 look --

9 THE COURT: Where in your motion did you ask for the
10 identified account?

11 MS. LARSEN: Oh, your Honor, that is -- the accounts
12 that they would be giving us information about would be the
13 accounts identified as that account holder's account.

14 THE COURT: Well, where -- all right.

15 MS. LARSEN: It can't work any other way.

16 THE COURT: Let's skip whether or not you added this
17 or not. Where do you have the authority to circumvent the
18 discovery orders as opposed to them just confirming they've got
19 an account? But you're asking them to go beyond. You're
20 asking them to go on and identify any other deposit accounts.

21 MS. LARSEN: Yeah, any accounts they're holding
22 subject to the preliminary injunction. That's correct.

23 And that would be one authorized pursuant to the
24 preliminary powers of this Court to enforce its preliminary
25 injunctions. It's also authorized pursuant to the case that I

1 just gave you.

2 And in addition to that, your Honor, when there were
3 objections raised -- and I can read you the portions of the
4 transcript by your Honor, not by Mr. Gerrard -- as to that
5 provision of the order, your point was does Rule 65 permit the
6 order to be served on banks, and I'll read you the portions of
7 this transcript --

8 THE COURT: Right. I never --

9 MS. LARSEN: -- because I just looked them up.

10 THE COURT: -- looked at the -- I never thought about
11 the discovery aspect you were doing in the second part of the
12 order.

13 MS. LARSEN: And --

14 THE COURT: I --

15 MS. LARSEN: And --

16 THE COURT: -- was not focused on that.

17 MS. LARSEN: And neither was it raised by
18 Mr. Gerrard, and neither to this time has it been raised in any
19 written --

20 THE COURT: All right.

21 MS. LARSEN: -- objection.

22 THE COURT: I'll take the matter under submission.
23 I'm sincerely suspect about it.

24 Would you respond to her points and authorities,
25 Mr. Gerrard.

1 MR. GERRARD: Your Honor, I will if you'd like me to.
2 There's really no points and authorities that I would submit
3 because it's based upon what happened at the hearing. It's not
4 based upon any authorities, per se.

5 What she's saying is, in essence, we believe we have the
6 right to put this in the order because it wasn't objected to at
7 the last hearing, and that's simply not the case.

8 She read you the part of the transcript where your Honor
9 said that whole paragraph was a problem, and we agree that it
10 was a problem. It was discussed at the last hearing, and so
11 they were supposed to provide some legal authority within 48
12 hours.

13 They did provide some legal authority. It didn't go to
14 this issue, within 48 hours. There's nothing that --

15 THE COURT: Okay.

16 MR. GERRARD: -- allowed them to do this.

17 And in the prior order which your Honor has now looked at,
18 we did give them permission to get confirmation about that one
19 specific account, and that's all we agreed to.

20 And so I can supplement if you'd like me to. I don't
21 really find it necessary.

22 THE COURT: You know, you're right. On second
23 thought, this clearly goes beyond -- you know, you -- assuming
24 for the moment -- and I apparently missed the authorities that
25 came in. When I looked the other day, they were filed earlier,

1 and I guess I thought they were, and I missed them, and I don't
2 recall ever seeing a courtesy copy, but that's -- I'll take the
3 blame for that. I'll look at that.

4 But in any case, I'm not going to order a preliminary
5 injunction that they confirm any other accounts. You do that
6 through discovery.

7 You've cut so many corners. I can't get you to follow
8 procedures. You know, you've got to follow procedures. It
9 doesn't belong in the injunction. Enough.

10 MS. LARSEN: Well, your Honor --

11 THE COURT: It doesn't belong in an injunction.

12 MS. LARSEN: I --

13 THE COURT: You --

14 MS. LARSEN: You haven't seen any authority --

15 THE COURT RECORDER: I'm sorry, Counsel.

16 (Indiscernible) --

17 THE COURT: It doesn't --

18 THE COURT RECORDER: -- please.

19 THE COURT: -- belong in an injunction.

20 MS. LARSEN: Well, would you look at the case that I
21 cited you, your Honor? At least look at that before you
22 (indiscernible).

23 THE COURT: I will.

24 MS. LARSEN: Thank you.

25 THE COURT: And it better deal with that

1 specifically. All right.

2 Now, on the trial schedule issues.

3 Oh, I assume there's no use for a settlement conference?
4 I mean, you're still not prepared, Mr. Gordon, for a settlement
5 conference?

6 MR. GORDON: Oh, no, no. We talked to Mr. Gerrard.
7 We think that is now appropriate.

8 THE COURT: Oh, you do. Okay.

9 MR. GORDON: Yes, yes. And may I explain --

10 THE COURT: Um-h'm.

11 MR. GORDON: -- where we are in -- again, your Honor,
12 I am going to try to lay something out to the Court as what we
13 think where we would suggest this goes, and I'm not being
14 confronting with anyone or adversarial. We just need to
15 represent the interest of HMA.

16 As I stated before, at this moment technically, and I use
17 the word "technically", there is an automatic stay in place.

18 THE COURT: Right.

19 MR. GORDON: One of the reasons we filed the HMA
20 bankruptcy was in looking at our trial which is set to go on
21 June 4th, we have Diversified as a plaintiff seeking
22 constructive trust against all the proceeds that HMA received
23 from the sale of the Royal Hotel, and that would include all
24 the moneys that have already been distributed and whatever else
25 we have that would come into the estate.

1 Prior to the bankruptcy, we were able to conclude the
2 payoff of Liberty Bank. We stayed within the terms of the
3 stipulated order that was entered in this adversary which
4 allowed us to conclude that transaction.

5 We attempted to also conclude the sale of the Liberty
6 accounts receivable to the buyer of the Royal Hotel. But given
7 unsecured creditors and other issues, it just was not possible
8 to conclude that. We hope that we will be able to conclude it
9 in the bankruptcy and what I, as I said to the counsel for the
10 buyer, and not deal with some of the clutter. We're waiting
11 for a response now.

12 But we put it in into Chapter (indiscernible) both to deal
13 with that issue and also primarily, again, the trial.

14 In addition to the constructive trust, Diversified has a
15 claim against HMA for 13,670,000 for conversion. In addition
16 to that, they are pursuing various fraudulent transfer actions
17 both under state law NRS 112 and also under Sections 548 and
18 550. Obviously, with the filing by HMA, we take those rights.

19 Mr. Reale a couple days ago filed an extensive answer,
20 counterclaim, and cross-claim. Without going into all the
21 various causes of action, in the fourth cause of action
22 Mr. Reale is seeking constructive trust against HMA, and in the
23 sixth cause of action he is seeking what, in essence, is a
24 declaration that HMA, Diversified, USAIP, USAIP Investor IV,
25 USACM, and Mr. Hantges, and Mr. Milanowski are all alter egos

1 of each other, and, therefore, HMA is liable to Mr. Reale for
2 all claims he may have against any of them.

3 On top of that, we have a jury demand which was filed by
4 Mr. Reale back on January 29, '07, which has not been dealt
5 with, and we have -- from Great White we have a motion to
6 withdraw the reference which is now apparently processing or is
7 pending before the district court, and we have as alluded to or
8 stated by Mr. Landess an objection to any discovery going
9 forward on the basis there has not been a Rule 26 meeting.

10 We filed an answer and certain cross-claims, and we've
11 asserted fraudulent transfer. For instance, we've asserted
12 unjust enrichment, those various items against Mr. Reale,
13 Great White, the media transferees from Great White,
14 USA Commercial Real Estate, not all the parties, just those
15 that we felt whoever was appropriate.

16 And bottom line is no discovery has been really conducted,
17 and we have a trial date of June 4. We're just simply not
18 prepared nor do I think anyone is, in essence, prepared to go
19 to trial on June 4 given that no discovery basically has been
20 done. We have all these issues.

21 In fact, we will be filing an answer, a response to
22 Mr. Reale answer, and I think is scheduled for the 24th.
23 Answers to our cross-claims aren't due until the 25th or 26th,
24 so we have a -- we're in a quagmire.

25 And I appreciate what the Court said previously to me in

1 terms of where she was in terms of her sensitivity with regard
2 to that trial date.

3 THE COURT: And my concern is this. And, look, I
4 recognize -- and everybody did, too -- that these are
5 complicated issues, and it's an aggressive trial schedule.

6 But the problem is that Diversified is being so very
7 aggressive in the amount it seeks to an injunction attachment,
8 and it is not -- based upon the case it has at this stage --
9 fair to continue that, and Mr. Gerrard wanted the trial early.

10 MR. GORDON: May I --

11 THE COURT: That's where --

12 MR. GORDON: May I --

13 THE COURT: -- we are and why we are.

14 MR. GORDON: May I propose what I think is the
15 solution, and that is -- may I approach the bench? We filed --

16 THE COURT: Well --

17 MR. GORDON: -- this this morning.

18 THE COURT: -- you could propose all day you want,
19 but I want to know what everybody else thinks.

20 MR. GORDON: Well --

21 THE COURT: If everybody else doesn't agree to it --

22 MR. GORDON: -- let me put a proposal out, and then
23 everyone can --

24 THE COURT: Not on my time you're not. Talk to
25 everybody else first.

1 MR. GORDON: Well, I've spoken to Great White, and
2 they don't have a problem with continuing the trial date.

3 THE COURT: Okay. But Mr. Gerrard is kind of the
4 big --

5 MR. GORDON: And --

6 THE COURT: -- (indiscernible).

7 MR. GORDON: And that's where my solution, my
8 proposal is --

9 THE COURT: Okay.

10 MR. GORDON: -- if I could have -- okay.

11 May I approach the bench?

12 THE COURT: All right. Is this what you just filed
13 yesterday --

14 MR. GORDON: No. This was --

15 THE COURT: -- or just now?

16 MR. GORDON: -- filed this morning. It was intended
17 to be --

18 THE COURT: Yeah. I have a copy of that.

19 MR. GORDON: -- filed yesterday, but I did not get
20 it.

21 THE COURT: We downloaded that. Thanks.

22 MR. GORDON: Okay.

23 THE CLERK: We have it.

24 MR. GORDON: Okay. Your Honor, one of the causes of
25 action we've also sought in our answer and cross-claim is

1 injunctive relief against Mr. Reale releasing his funds, and we
2 feel that we have a better cause of action to cause Mr. Reale
3 to enjoin.

4 And our belief is -- and I won't go into the merits of it.
5 We believe that just simply based on his answer that he's filed
6 and his statements that we have we can establish a prima facie
7 case and meet the standards for preliminary injunction.

8 What I would propose is that the Court adopt -- set off
9 the trial by 90 days. There's no way that we can see where it
10 can be bifurcated, allow Diversified to try its claim against
11 Mr. Reale without -- it just can't be because it's basically a
12 constructive-trust theory that they're establishing against
13 Mr. Reale. And if they win, then we have no assets in this
14 estate, so it goes to the very merits of what HMA's estate is.

15 On the other hand, we are prepared, your Honor, to file
16 our own motion for preliminary injunction late this afternoon
17 or Monday, and what we would propose is is that what the Court
18 do hear since it has time on June 4th and 5th is the
19 preliminary-injunction hearing.

20 And if the Court finds that there's prima facie standards
21 to continue to enjoin Mr. Reale's money, that it do so, but
22 that the trial on the merits be put off.

23 What the Court has done is is entered a TRO. It's made
24 certain findings to continue the TRO, but it really hasn't
25 conducted a trial and evidentiary hearings with regard to the

1 preliminary injunction, and that's what we would propose.

2 As long as you have the time, we're prepared to go forward
3 on that day. We appreciate what the Court said, and that does
4 not affect Mr. Reale at all because he's already going to trial
5 on -- he already knows his money is enjoined until June 4th or
6 5th.

7 And we understand the standards for a preliminary
8 injunction. We believe that we can meet it. If we can't, then
9 the Court releases the injunction for the funds and we go to
10 trial on a normal trial schedule, though, what we have proposed
11 is a very aggressive one through the first week of September
12 with various dates.

13 Now, obviously, these dates we proposed we can play with
14 them a couple days here or there, but what we're trying to do
15 is say, look, everyone, we're prepared to go forward very
16 quickly, get discovery done, disclose experts, do all those
17 things as required under the federal rules to get prepared to
18 go to trial and go to trial.

19 In the meantime, we're prepared -- and we've told
20 Mr. Gerrard. We feel now we have a pretty good handle on
21 Mr. Reale's overall issues involving USAIP and the other
22 entities where he's claimed a security interest involved with
23 USAIP, and we feel that while you're gone and before June 4th
24 we can go to a settlement conference before Judge Markell.

25 We feel comfortable enough now that we understand where he

1 lies, where Diversified. We're not comfortable enough to go --
2 to start doing evidentiary proofs at a trial, but we feel
3 comfortable --

4 THE COURT: Okay.

5 MR. GORDON: -- we can participate.

6 THE COURT: Now --

7 MR. GORDON: That's our suggestion, and we hope
8 that --

9 THE COURT: Okay.

10 MR. GORDON: -- everyone is okay with that and we can
11 simply try to get this into a normal course.

12 THE COURT: Okay. Though I recognize that there is a
13 stay against HMA, I was just prepared to hear an emergency
14 motion to lift stay.

15 MR. GORDON: I know that. And, your Honor, as I
16 said, we filed our answer, so it's kind of like we're being
17 practical here.

18 THE COURT: Right. Right.

19 Mr. Landess.

20 MR. LANDESS: Your Honor, let me just kind of broad
21 brush it. It makes sense to do something along that Mr. Gordon
22 has suggested because we're presently in a real morass with
23 respect to discovery.

24 The plaintiffs have failed to comply with some of the
25 local rules, for example. We've never had a 26(f) conference.

1 We haven't met and conferred. There haven't been the voluntary
2 disclosures that are required.

3 And so that came to a point here just a week or two ago
4 they decided they wanted to engage in a whole battery of
5 discovery. They had sent out requests for production,
6 interrogatories, noticed up a bunch of depositions, mine
7 included.

8 I notified them that you can't do this under our local
9 rules unless we have a meet-and-confer conference. Ms. Larsen
10 tried to rectify that by getting everybody on the telephone a
11 few days ago.

12 I informed her that doesn't cut muster. Here in our
13 jurisdiction we've got to meet face to face. We've got to talk
14 about these issues. We have to exchange documents, a witness
15 list, and maybe we can streamline discovery if we do that.

16 And because that hasn't been done, Rule 26(d) comes into
17 play, but she's not engaged to and she's not entitled to
18 proceed with any of this discovery, and what attempts that she
19 has made are ineffectual, therefore, highlighting the necessity
20 to do what counsel has just pointed out.

21 Let's get some orderliness. Let's have a 26(f)
22 conference. Let's get a discovery plan. Let's know what our
23 cutoff deadlines are as to taking discovery, disclosure of
24 expert witnesses, dispositive motions. None of those things
25 are before us, and here we are tracking for a trial date two

1 weeks from now.

2 So I think in the spirit of cooperativeness and trying to
3 help the Court that it would behoove all of us to get some
4 orderliness underneath our belts here.

5 THE COURT: Okay. Mr. Gerrard, any comments?

6 MR. GERRARD: It's probably not surprising to
7 your Honor we disagree with this.

8 My client was sued at the end of December of 2006. His
9 money has been tied up continuously from that time until the
10 present time, the period that is in excess of five months now,
11 and by the time the trial arrives it would have been
12 approximately six months.

13 And your Honor understandably being concerned about that
14 fact and in balancing the equities set a trial date, and
15 everyone was aware of it, and we were here at a hearing back in
16 mid March, and I don't -- I was just looking to see if I could
17 see the date, and I believe it was actually March 22nd, but I
18 don't --

19 THE COURT: Well, we do have a new player in the
20 sense that HMA was previously represented by the very same
21 people who everybody seems to have alleged defrauded them.

22 MR. GERRARD: Agreed.

23 THE COURT: So that is a big --

24 MR. GERRARD: And --

25 THE COURT: -- distinction because we now have a

1 player who is the person who was maybe both -- and he was both
2 harmed and the one that caused the harm as well, so --

3 MR. GERRARD: I understand that --

4 THE COURT: Um-h'm.

5 MR. GERRARD: -- and that's why I brought up that
6 hearing.

7 THE COURT: Um-h'm.

8 MR. GERRARD: It was at that hearing back in mid
9 March when we came in for a preliminary-injunction hearing, and
10 essentially we had a settlement conference that was set up as
11 well as your Honor may recall.

12 And USA Investment Partners had been placed into
13 bankruptcy, and Mr. Gordon appeared and said, you know, we
14 can't do a settlement conference and we're a new party in this
15 case.

16 As Mr. Gordon just acknowledged, he was advised at that
17 time by your Honor that we had a trial date scheduled for the
18 beginning of June.

19 There has been, contrary to what was said, a lot of
20 discovery that's been done. To suggest that there's no
21 discovery that's been done is I think misleading.

22 We have conducted depositions of numerous people. I have
23 a large stack of deposition transcripts back at my office, and
24 we have had, you know, 6- or 7,000 pages of documents that have
25 been produced, and we are ready to go to trial.

1 We have an expert witness whose report will be prepared by
2 -- and to be produced by agreement between us and Diversified
3 by Wednesday of next week. Diversified's expert was to have
4 provided the same information.

5 I acknowledge, readily acknowledge the problem that this
6 presents to your Honor with the new party, and I'm not trying
7 to discount that. What I'm trying to show your Honor is that
8 my client has really been put in a difficult bind, and I have
9 told you this many times.

10 THE COURT: So what is the problem, then, I mean,
11 with -- and I think you're the one that said you would like
12 another settlement conference.

13 MR. GERRARD: I think that the last settlement
14 conference would have been beneficial if HMA's new counsel --

15 THE COURT: So you don't want to handle it?

16 MR. GERRARD: -- had been involved long enough at
17 that point, so I fully agree that we do need a new --

18 THE COURT: Okay.

19 MR. GERRARD: -- settlement --

20 THE COURT: Okay.

21 MR. GERRARD: -- conference.

22 THE COURT: Okay.

23 MR. GERRARD: I wish that it could have happened
24 sooner is what I'm saying.

25 THE COURT: I don't disagree. I don't disagree.

1 MR. GERRARD: So --

2 THE COURT: So let me --

3 MR. GERRARD: But pushing --

4 THE COURT: It might make some sense. I'm inclined
5 to take Mr. Gordon's suggestion, but the point is the trial --
6 and we could make it the fifth and sixth.

7 (Indiscernible) a preliminary-junction hearing, and, you
8 know, I recognize that I've granted a preliminary injunction at
9 this stage, but that was sort of a -- I guess we all sort of
10 agree sort of an extended TRO.

11 And the injunction -- they're going to have higher
12 standards in the fifth and sixth. They're going to have to
13 like -- well, you've got your evidence. If they can't meet
14 your evidence, then I think they'll lose because you're right.
15 We're enjoining your client.

16 MR. GERRARD: It --

17 THE COURT: If they want to forego the injunction --

18 MR. GERRARD: The problem that I have and that I've
19 presented to your Honor before is this has been enormously
20 expensive to my client, and all of his money is tied up except
21 for what your Honor released when you were trying to balance
22 the equities and set the bond amount.

23 And the result of that is that we need to get this matter
24 to trial --

25 THE COURT: Right.

1 MR. GERRARD: -- as quickly as we can. I understand
2 what you're saying --

3 THE COURT: So on the 4th or 5th if we have the
4 injunction hearing --

5 MR. GERRARD: But, again --

6 THE COURT: -- and they've got to show substantial
7 likelihood --

8 MR. GERRARD: But that is not going to dispose of the
9 case.

10 THE COURT: Well, what do you propose?

11 MR. GERRARD: So then we're going to have to come
12 back.

13 THE COURT: When do you propose we go to trial?

14 MR. GERRARD: Well, I would say let's push the trial
15 date back 30 days. I mean, there should be enough time in a
16 30-day extension for them to conduct whatever discovery they
17 want to do. It's not like this is a --

18 THE COURT: So you're just saying 30 days.

19 MR. GERRARD: Yes.

20 THE COURT: Okay.

21 MR. GERRARD: I mean, because that would give them 45
22 days from now before we could go into trial, and these are
23 straightforward issues. I mean, HMA's insolvency is not a
24 great mystery.

25 You know, other assets essentially were sold the 22nd of

1 December. You have a liquidated amount that tells you what the
2 asset's value was and offers for the remaining assets.

3 And as far as the debts go, they're very straightforward
4 as well. The main question's going to be whether the money
5 that was contributed to HMA by USA Investment Partners, one of
6 its members, is treated as capital or whether it's treated as a
7 loan.

8 THE COURT: All right. But this is the question.
9 Are you available the 2nd and 3rd and 5th and 6th of July
10 because that's Fourth of July week.

11 MR. GERRARD: How about give me just one second to
12 check that. I could be available the following week. That
13 week I'm not available because I have to actually go pick up my
14 wife out of town, so --

15 THE COURT: I'm not available the next week --

16 MR. GERRARD: Okay.

17 THE COURT: -- so if the first --

18 MR. GERRARD: What about the week after that? I --

19 THE COURT: No. Ninth Circuit conference.

20 MR. GERRARD: Is there --

21 THE COURT: So you --

22 MR. GERRARD: Is there a time in July when we could
23 do it?

24 THE COURT: You can't get 'til -- I'd have to move
25 everybody.

1 MR. GERRARD: I could do it the week before that.

2 THE COURT: But the week of July 23rd is the first
3 that I could get you in July.

4 MR. GERRARD: What about the last week of June,
5 your Honor?

6 THE COURT: No. I have entire week of trials that
7 week.

8 THE CLERK: (Indiscernible).

9 THE COURT: But that was only a half day.

10 THE CLERK: (Indiscernible).

11 THE COURT: But that's not even a month away.

12 I mean, you haven't even moved to lift stay, yet, so,
13 arguably, you do --

14 MR. GERRARD: No, and we can. But as counsel has
15 already stated, they filed an answer and counterclaims in this
16 case which, you know, there's case law which suggests that
17 that's a waiver as well.

18 THE COURT: I just can't because one thing I have is
19 the USA Commercial fees. And I suspect that even after the
20 hearing, I'll be working my way through those.

21 So I just can't the last week. I have a trial or motions
22 all day every day in June. There's not one day free. Of
23 course if this trial goes off, that's four days that's freed
24 up, so that helps a little bit.

25 MR. GERRARD: So the earliest you --

1 THE COURT: So the first I can get to you is
2 July 23rd.

3 MR. GERRARD: Well, then we would request -- then we
4 would request that we go that week.

5 THE COURT: All right. I'll do that.

6 MR. GORDON: Your Honor --

7 THE COURT: Uh-huh.

8 MR. GORDON: -- a couple clarifications.

9 THE COURT: So the injunction would stay in place
10 other than the bank issue which I'll reserve looking at the
11 legal issue on that.

12 MR. GORDON: Well, a couple clarifications --

13 MR. GERRARD: Was that --

14 MR. GORDON: -- with regard to that date.

15 THE COURT: Um-h'm.

16 MR. GERRARD: Let me respond to what the Judge said
17 first.

18 That's extending us out approximately -- well, it's almost
19 two months. It's, you know, a month and 23 days.

20 THE COURT: I appreciate that. That's why I'm --

21 MR. GERRARD: And --

22 THE COURT: -- clarifying this.

23 MR. GERRARD: Yeah. I understand. And what I'm
24 asking is is the Court willing to modify that injunction to
25 again release some additional money to my client for having

1 extended it out for another approximately two months so that he
2 can continue to pay his legal fees and be able to proceed
3 forward in balancing the equities that you have been trying to
4 do up to this point in time.

5 THE COURT: Um-h'm. Mr. Gordon?

6 MR. GORDON: Well, a couple things, your Honor, and
7 I'll get to that point. There's still a jury trial demand out
8 there. Are we trying this as a jury trial?

9 THE COURT: Oh. Whose jury trial? Is this Mr. --

10 MR. GORDON: Mr. Gerrard's.

11 THE COURT: Well, then you cannot have a jury trial
12 July 23rd.

13 MR. GERRARD: Well, your Honor, I don't think that
14 we're going to be -- here's the way I see it, and you can
15 correct me if you think that I'm wrong.

16 The claims that were brought originally are state court
17 claims for fraudulent transfer, and those are legal claims.
18 Notwithstanding what's been filed, those are legal claims.

19 Those legal claims, Diversified's no longer going to have
20 standing to bring. They can bring their constructive trust and
21 their unjust enrichment --

22 THE COURT: Just tell me what you want to do with the
23 jury trial.

24 MR. GERRARD: What --

25 THE COURT: I don't want to hear about whether or not

1 you have a right to it. I understand your positions, but --

2 MR. GERRARD: Yeah. I'm just trying to explain to
3 you where I see this, because I haven't had a chance to analyze
4 it.

5 But given that the fraudulent transfer claims are going to
6 be brought by HMA are core matters, there's not going to be a
7 right to a jury trial on those issues.

8 THE COURT: So as long as you concede that issue on
9 -- and we just go to trial. So we would only go to trial on
10 the fraudulent-conveyance issues brought by HMA. Is that --

11 MR. GERRARD: Well, and whatever other claims
12 Diversified still is bringing. I mean, we want to dispose of
13 it all at once, obviously.

14 MR. GORDON: My second point, the counterclaim or the
15 cross-claim brought by -- filed yesterday and the day before
16 includes -- put aside the constructive trust, includes having
17 to try the issue of that HMA, USAIP, USAIP Investors VI --
18 Investor VI or Hantges -- Mr. Hantges, Mr. Milanowski, USACM,
19 and Diversified are all alter egos of each other.

20 THE COURT: So I assume you're willing to waive that
21 defense for an early trial and bifurcate it. In other words,
22 the bifurcation would be trial in conveyance first?

23 MR. GERRARD: Yes. We can do the fraudulent transfer
24 of claims first. Yes.

25 MR. GORDON: So what we're trying is the fraudulent

1 transfer claims. With that --

2 MR. GERRARD: And the other claims --

3 THE COURT: It would be bifurcated.

4 MR. GERRARD: And the other claims that have already
5 been asserted by Diversified, their constructive-trust claim,
6 their unjust-enrichment claim --

7 MR. GORDON: All right.

8 MR. GERRARD: Yeah.

9 MR. GORDON: No. 3, we have now both filed answers
10 with counterclaims -- with cross-claims and in Mr. Reale's case
11 with counterclaims.

12 I assume that we're going to be at issue in terms of
13 answers to those. We're prepared to simply file an answer and
14 not a motion to dismiss and not go through that process.

15 If we do that, our answers are due near the end of the
16 month, and we're going to be well into June, and I understand
17 what the Court's saying with regard to the USACM fee hearings.

18 We're never going to get at issue for this, so I'm --

19 THE COURT: Well, and can't we just bifurcate on the
20 fraudulent conveyance?

21 MR. GORDON: I'm happy to do that.

22 MR. GERRARD: And, your Honor, there's nothing to
23 prevent us from starting discovery now and waiving the Rule 26
24 requirements --

25 MR. GORDON: Your Honor, look --

1 MR. GERRARD: -- for that.

2 MR. GORDON: -- I'd rather hold a Rule 26 conference
3 next week --

4 THE COURT: Yes. Exactly.

5 MR. GORDON: -- and just do it --

6 THE COURT: Exactly.

7 MR. GORDON: -- and take those times, shorten it
8 down.

9 If the Court wishes to go to trial July 23rd, that's fine.
10 Mr. Kistler is going to be trying the case for us. I
11 checked with him, and he's available the first week of
12 August --

13 THE COURT: All right.

14 MR. GORDON: -- if that makes some more sense.

15 THE COURT: So let's do this. The 25th
16 Judge Markell's available for a settlement conference.

17 MR. GERRARD: Perfect.

18 THE COURT: Do I understand everybody's available for
19 a settlement conference?

20 MR. GERRARD: That would be the 25th --

21 THE COURT: Okay.

22 MR. GERRARD: -- of June or the 25th of May?

23 THE COURT: May.

24 MR. GERRARD: Okay. Yeah. Yes.

25 THE COURT: Then let's have a scheduling conference

1 on May 31st at 2:30. In the meantime, you'll work out your
2 discovery plans, how we intend to bifurcate, et cetera.

3 I will reserve back the 5th and 6th of June. I won't give
4 it away. I'll save it in case it turns out we have to have a
5 hearing on the preliminary injunction so that the trial is then
6 postponed to some later date.

7 MR. GERRARD: Okay. It --

8 THE COURT: So that gives you the option when you're
9 discussing things what we're going to do.

10 MR. GORDON: Well, to have that on the 5th and 6th of
11 June, that we will file -- if it makes sense, we can file a
12 motion for preliminary junction, have it pending.

13 THE COURT: Okay.

14 MR. GORDON: Okay. Because we can't go unless we're
15 at issue and let Mr. Gerrard know what our position is --

16 THE COURT: Right. Right.

17 MR. GORDON: -- and have the Court be able to review
18 it.

19 THE COURT: So I'll just save --

20 MR. GORDON: Okay.

21 THE COURT: -- the 5th and 6th back --

22 THE CLERK: Now, they --

23 THE COURT: -- such if we need those days --

24 THE CLERK: Judge, (indiscernible) --

25 THE COURT: -- for a hearing --

1 THE CLERK: -- the 4th and 5th.

2 THE COURT: No. I want to keep the 4th free. Oh,
3 you say -- I understand what you're saying.

4 THE CLERK: Yeah.

5 THE COURT: The 6th is a motion day.

6 MR. GORDON: Yeah.

7 THE CLERK: Right.

8 MR. GERRARD: Yeah. You had a Wednesday on --

9 MR. GORDON: Yeah.

10 MR. GERRARD: -- or something like that.

11 THE COURT: But let's do Tuesday and -- I don't want
12 to do a Monday/Tuesday because Monday you're going to need --
13 that's too soon.

14 THE CLERK: Okay.

15 THE COURT: How about --

16 THE CLERK: The 7th and 8th?

17 THE COURT: -- 7th and 8th, then?

18 MR. GORDON: So the 7th and 8th of June is held back,
19 and we will file the preliminary injunction. We'll set it for
20 those days, and then we'll work with Mr. Gerrard --

21 THE COURT: Right.

22 MR. GORDON: -- in terms of going forth.

23 MR. GERRARD: And --

24 MR. GORDON: That's fine.

25 MR. GERRARD: And --

1 MR. GORDON: As far as the -- okay. Go ahead. I'm
2 sorry.

3 MR. GERRARD: I'm sorry. That's okay.

4 MR. GORDON: Yeah.

5 MR. GERRARD: If you're done. Two --

6 MR. GORDON: No. I was going to deal with the
7 release of funds.

8 MR. GERRARD: Well, I was going to ask about that,
9 but one question before that.

10 With respect to these dates, are we -- am I hearing
11 Mr. Gordon say that he's willing to stipulate to having the
12 stay lifted for this matter to go forward or do we need to file
13 that emergency motion?

14 MR. GORDON: No. I'm stipulating to let it go
15 forward.

16 THE COURT: Okay. Good. All right.

17 Why don't you discuss the release of funds, and we'll deal
18 with it on the 31st if you haven't come to an agreement.

19 MR. GORDON: That's fine.

20 THE COURT: It would be my inclination since he has
21 to wait 45 more days to allow it, but I'll certainly hear
22 argument and you can discuss it in the meantime.

23 MR. GERRARD: The 30 -- did you say --

24 THE COURT: And I absolutely agree --

25 MR. GERRARD: -- the 31st?

1 UNIDENTIFIED SPEAKER: 31st.

2 THE COURT: Yeah.

3 MR. GERRARD: Oh.

4 THE COURT: Um-h'm.

5 THE CLERK: (Indiscernible).

6 THE COURT: May.

7 MR. GERRARD: Oh, May 31st. The scheduling
8 conference. Okay.

9 THE COURT: Correct.

10 MR. GERRARD: I got you.

11 UNIDENTIFIED SPEAKER: Okay.

12 THE CLERK: At 2:30.

13 THE COURT: And I absolutely agree. We need some
14 order in this case.

15 (Colloquy off the record.)

16 THE COURT: It was my fault for forgetting to mention
17 to everybody -- maybe I just didn't need to -- the -- you know,
18 you've got to follow Local Rule 26, but it sounds like you've
19 informally waived it anyway, so --

20 MR. GORDON: Okay. So let me just go back. With
21 regard to the May 25th settlement conference, is there a time
22 on that, and is the Court going to enter an order --

23 THE COURT: Yes. We will enter an order.

24 MR. GORDON: Thank you.

25 THE COURT: But, in the meantime, everybody knows the

1 standard settlement conference order. The representative must
2 be present as well.

3 MR. GERRARD: And your Honor ordered last time that
4 this time the parties actually participate in good faith --

5 THE COURT: Yes.

6 MR. GERRARD: -- and with an effort to try and
7 resolving that.

8 THE COURT: And I want to know that now. If you
9 think you're not ready for this conference, I want to know now.
10 I don't want to waste Judge Markell's time.

11 MR. GORDON: No. Your Honor, from the standpoint of
12 HMA -- and I can speak for USAIP -- we will be at issue on all
13 issues so that if it's going to -- the settlement with
14 Mr. Gerrard and Mr. Reale will go beyond simply HMA. That's
15 our --

16 THE COURT: Well, that's kind --

17 MR. GORDON: That's our concern.

18 THE COURT: -- of the whole point because --

19 MR. GORDON: And that's perfect.

20 THE COURT: That's right.

21 MR. GORDON: That's where we want to be, too.

22 THE COURT: Yeah.

23 MR. GORDON: Okay? No, we're fine. We feel
24 comfortable with that.

25 THE COURT: Okay. I understand Mr. Orrick is ill

1 today, but he'll be available on the 25th?

2 MR. LANDESS: He will, and would it be all right --

3 THE COURT RECORDER: Counsel, I'm sorry. Could you
4 speak into --

5 MR. LANDESS: -- if some --

6 THE COURT RECORDER: -- a microphone, please.

7 MR. LANDESS: Would it be all right, your Honor, as
8 far as Great White at the settlement conference if we had a
9 representative there rather than the --

10 THE COURT: Yes.

11 MR. LANDESS: -- 20 old people from all over --

12 THE COURT: Yes.

13 MR. LANDESS: -- the country --

14 THE COURT: You're --

15 MR. LANDESS: -- traveling here?

16 THE COURT: You're right. Thank you about that for
17 clarifying that.

18 MR. LANDESS: Okay. And I just want to just for the
19 record say, you know, that Great White and myself since I've
20 been named as a party has filed a request for a jury trial in
21 this matter, too, so I don't know how that shapes out in --

22 THE COURT: Well, the point -- we'll have to discuss
23 that the 31st.

24 MR. LANDESS: Okay.

25 THE COURT: In other words, it would be my intent

1 that if we do an early trial in July, that it be a bifurcated
2 trial, and that would obviate any jury trial issues --

3 MR. GORDON: That's correct.

4 THE COURT: -- so we don't have to deal with whether
5 or not there's a right, just --

6 MR. GORDON: Yeah.

7 THE COURT: -- bifurcate.

8 MR. GORDON: Our issues against Great White are two,
9 unjust enrichment, but primarily the fraudulent-transfer
10 issues, and against immediates. Obviously it's under 550,
11 so --

12 THE COURT: Right.

13 MR. GORDON: So it's a core matter --

14 THE COURT: Right.

15 MR. GORDON: -- from that standpoint.

16 THE COURT: And so we do have -- everything has
17 changed because we now have a debtor.

18 MR. LANDESS: Okay. Thank you, your Honor.

19 MR. GORDON: Yeah. I appreciate that, your Honor. I
20 appreciate the Court's indulgence and counsel's indulgence.

21 THE COURT: Okay.

22 MR. GERRARD: I didn't hear the time for the
23 settlement conference.

24 THE COURT: 2:30. Oh --

25 MR. GERRARD: Settlement --

1 THE COURT: -- settlement conference.

2 MR. GERRARD: Settlement conference.

3 THE COURT: Excuse me.

4 MR. GERRARD: Do you know --

5 THE COURT: 9:30, correct?

6 MR. GERRARD: -- what that was, Eileen?

7 THE CLERK: 9:30.

8 MR. GERRARD: 9:30? Okay.

9 MR. LANDESS: What day?

10 THE COURT: 25th, the settlement conference.

11 MR. LANDESS: 25th.

12 THE COURT: In Judge Markell's chambers.

13 MR. LANDESS: 9:30.

14 MS. LARSEN: I think I'd be remised if I did not
15 mention that the jury-trial issue, we have filed a motion to
16 strike the jury demand --

17 THE COURT: I understand that.

18 MS. LARSEN: -- even as to all of those --

19 THE COURT: Sure. And I understand --

20 MS. LARSEN: -- other appearance as well.

21 THE COURT: -- that's an issue we'll save past the
22 scheduling conferences because, you know, if we need to get to
23 it for the July date, but it sounds like everybody says let's
24 just do the nonjury trial. Even if there's a right, let's just
25 deal with what we -- everybody agrees it's a nonjury trial and

1 bifurcate that first. If not, then obviously the trial gets
2 postponed later.

3 MS. LARSEN: Thank you.

4 THE COURT: So, all right. Good. Thank you.

5 One final motion is the (indiscernible) motion, is that
6 right, the --

7 MR. NEVINS: Excuse me, your Honor.

8 THE COURT: I'm sorry.

9 MR. NEVINS: I'm sorry. This is Howard Nevins
10 appearing for defendant National Real Estate Holdings.

11 The dates that you had previously just mentioned for the
12 scheduling conference and the settlement conference, that
13 applies to all parties in the action?

14 THE COURT: Yes. Is National Realty (sic) a party as
15 well in this one?

16 MR. NEVINS: National Real Estate Holding --

17 THE COURT: Yes.

18 MR. NEVINS: -- is a defendant.

19 And the scheduling conference, did you say May 21st or
20 31st?

21 THE COURT: The scheduling conference is the 31st.
22 25th is the settlement conference.

23 MR. NEVINS: All right.

24 THE COURT: Thank you.

25 MR. NEVINS: Thank you.

1 MR. GORDON: Yes, your Honor. They are a defendant
2 in the main action, and we did not sue National Real Estate on
3 a cross-claim.

4 THE COURT: You did not. Okay.

5 MR. GORDON: We did not.

6 MR. NEVINS: And, your Honor, I just wish to point
7 out that National Real Estate Holding was just named in the
8 second amended complaint by the plaintiff in this action and
9 just filed an answer.

10 THE COURT: All right. Thank you.

11 MR. NEVINS: Thank you.

12 MS. LORADITCH: Your Honor, if I may on one
13 housekeeping note.

14 The motion to strike that Ms. Larsen mentioned, that was
15 filed with an OST request, and so does it make sense to just
16 hold that in abeyance and not --

17 THE COURT: Let's just set it for the 31st for status
18 only.

19 MS. LORADITCH: Okay. So we'll prepare the notice of
20 hearing on that day.

21 THE COURT: Okay. Just status only for that day.
22 That way you don't lose track of it. Thank you.

23 MR. LANDESS: What time?

24 THE COURT: Again, 2:30 on the 31st. All of these
25 matters will be at 2:30. All right.

1 Now, finally, we have the motion to compel against
2 Ms. Stevens? Anyone here on behalf of Ms. Stevens?

3 MR. SMITH: Yes. Good morning, your Honor.
4 Ulrich Smith --

5 THE COURT RECORDER: I'm sorry. I need to have you
6 speak into a microphone, please.

7 MR. SMITH: Oh, I apologize.

8 Good morning, your Honor. Ulrich Smith, Bar No. 2274, for
9 Ms. Stevens who is also present, your Honor.

10 THE COURT: Now, I don't see a written response.

11 MR. SMITH: No, Judge. It was on an order shortening
12 time. We did not have sufficient time. We'd like to make a
13 few oral representations. I think we --

14 THE COURT: No. I'm not going to do any oral
15 representations. You've got to respond in writing.

16 MR. SMITH: Can I have --

17 THE COURT: Well, I'll continue it to the 31st --

18 MR. SMITH: Thank you.

19 THE COURT: -- and I want a written response.

20 MR. SMITH: Thank you, Judge.

21 THE COURT: Because these issues are too complicated
22 to just do in oral representations.

23 MS. LARSEN: Well --

24 THE COURT: And --

25 MS. LARSEN: Well --

1 THE COURT: -- you deserve the right to see what
2 their contentions are.

3 MS. LARSEN: Right. And we just needed the OST
4 because of the June 4th trial date, and now that's off, so --

5 THE COURT: Okay. Good.

6 MS. LARSEN: -- that's fine.

7 MR. SMITH: So it's on the 31st at 2:30.

8 THE COURT: Yes.

9 MR. SMITH: Thank you, Judge.

10 THE COURT: Okay.

11 MR. GORDON: Your Honor, just one follow up --

12 THE COURT: Um-h'm.

13 MR. GORDON: -- just so we're -- as all counsel here
14 including Mr. Nevins is on the phone, we would propose that
15 Mr. Kistler from our office will make communication with
16 everyone and try to conduct a Rule 26 conference next week and
17 try to get all the dates down and work up a clear scheduling
18 order.

19 THE COURT: Yes.

20 MR. GORDON: So I would just ask that everyone
21 attempt to have their schedules available, their calendar, so
22 we can have that early next week.

23 THE COURT: Okay. And I will indeed order -- I don't
24 need to order, but I'm going to order a Rule 26 meeting.

25 MR. GORDON: Okay.

1 THE COURT: So --

2 MR. GORDON: Thank you, your Honor.

3 THE COURT: All right. Thank you very much.

4 THE CLERK: All rise.

5 (Court concluded at 11:56:26 a.m.)

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1 I certify that the foregoing is a correct transcript from
2 the electronic sound recording of the proceedings in the
3 above-entitled matter.

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5
6 /s/ Michele Phelps

10/21/10

7 _____
Michele Phelps, Transcriptionist

Date